

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1220

ORIGINAL

To be argued by
KRISTIN BOOTH GLEN

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1220

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

VINCENT ALOI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT VINCENT ALOI

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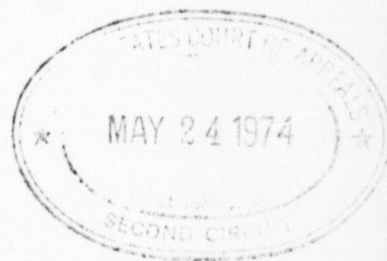


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,	:	
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Appellee,	:	
	:	
-v-	:	
	:	
VINCENT ALOI,	:	Docket No. 74-1220
	:	
Defendant-Appellant,	:	
	:	
and	:	
	:	
RALPH LOMBARDO, JOHN DIOGUARDI,	:	
and JOHN SAVINO,	:	
	:	
Defendants.	:	
-----x	:	

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Southern District of New York [Knapp, J.], rendered February 5, 1974. Appellant Vincent Aloï was convicted, after a jury trial,¹ of one count of conspiracy to violate 15 U.S.C. Section 77q(a), one count of using a fraudulent offering circular in violation of 15 U.S.C. Section 775, and one count of wire fraud (18 U.S.C. Section 1343).

¹The indictment originally named 16 co-defendants; four were severed immediately prior to trial, Appellant's father Sebastian Aloï was severed prior to trial for health reasons, three named defendants testified for the government; one defendant, Fusco, began trial but was severed prior to the verdict because of illness.

Judge Knapp imposed a sentence of five years on the first count, four on the second, to run consecutively, and five suspended on the third. The entire sentence was to run consecutively to an indeterminate state sentence with a maximum of seven years.² The maximum fines on each count, totaling \$16,000.00, were also imposed.

SUMMARY OF ARGUMENT

The trial below was long³ and confusing. It involved extensive testimony and numerous exhibits about a complex securities fraud which employed the most sophisticated techniques of stock manipulation. In the thousands of pages of transcript and hundreds of incidents described, the Appellant Vincent Aloï appears only a handful of times completely unconnected with the company whose stock was being manipulated, or the team of manipulators headed by Michael Hellerman.⁴ Aloï appears only to collect a prior, legitimate debt owed by Hellerman to the Defendants Fusco and Savino.

The indictment alleged a conspiracy to violate particular sections of the Securities Act of 1933. There was no evidence proving that Aloï even knew that the stock deal Hellerman was doing was illegal, much less that he know-

²That conviction is presently on direct appeal in the state courts.

³It lasted approximately 9 weeks; the trial transcript alone amounts to 6000 pages.

⁴Including underwriters (the defendants Fisher, Dragani, and TDA Securities), brokers (e.g., co-conspirators Kelsey and Schoengold and Schultz), attorneys (e.g., the defendant Morris Winter) and assorted flunkies (e.g. co-conspirator Bald).

ingly and intentionally joined a conspiracy with the requisite specific intent of violating those provisions. The complete failure of proof as to intent is alleged at Point I(a).

At most, the evidence showed a plethora of agreements with various participants and differing objectives rather than the single scheme alleged in the indictment. Extensive evidence as to multiple conspiracies of which he was not a member was admitted pursuant to the single conspiracy hearsay exception, and was impermissibly and prejudicially considered against Aloï. The admission of this evidence, the impermissible variance from the indictment, and the judge's failure to properly instruct the jury as to multiple conspiracies is alleged at Point I(b).

Aloï was also convicted of the use of a false offering circular in violation of certain regulations of the SEC. Since Aloï never knew of the existence of the circular, criminal liability was predicated entirely on his membership in the conspiracy under a Pinkerton theory. There was no proof, however, sufficient to show that any member of the conspiracy committed this crime with the requisite intent, nor was it shown that the circular was an instrumentality of the conspiracy upon which derivative liability could be predicated. Quite the contrary, the evidence demonstrated that the circular was completely irrelevant to the conspiracy, and that the crimes actually committed were other than those alleged in the indictment. These arguments are set forth in Point II(1)-(4).

Aloï's conviction on the wire fraud count is similarly unsupported by evidence, since there was no proof that the phone call charged was made "in

execution of a scheme to defraud, as charged by the indictment, " or even as to the contents of the call. These arguments are set forth in Point III.

Notwithstanding the enormous complexity of the case and the technical nature of the crimes alleged, the trial judge gave a charge which must break all records for brevity, and which was totally inadequate to apprise the jury of the applicable law.

The charge totally failed to describe the unlawful objectives of the conspiracy except in language so broad as to constitute a complete amendment of the indictment. It did not set forth the elements of either substantive crime, nor did it charge, as to the offering circular count, that someone must have wilfully violated the applicable provisions before derivative liability could be found. These arguments are set forth in Point II(5) and III(a) and in Point II of Appellant Dioguardi's brief, here adopted in its entirety pursuant to Rule 28(i) F.R.A.P.

Aloi was forced to trial, over numerous objections, with Appellant Dioguardi ("Johnny Dio") whose notoriety resulted in impermissible prejudice in time of jury selection and at trial. Extensive evidence of a continuing criminal record and unsavory associations (see Point I of Appellant Dioguardi's brief, specifically incorporated here pursuant to Rule 28(i), F.R.A.P.) inevitably spilled over onto his co-defendant Aloi. Similar impermissible and prejudicial evidence as to the Appellant Lombardo and innumerable general references to organized crime (see Points III and V of Lombardo's brief, specifically incorporated here pursuant to Rule 28(i) F.R.A.P.) also spilled over creating sufficient prejudice to require a severance.

The judge's failure to employ any of the procedural devices requested to cure or ameliorate the prejudice which accrued as a result of the joint trial was reversible error, as argued in Point IV, and deprived Aloï of due process of law.

Aloï was previously convicted in state court. The judge ruled that the government could use that conviction to impeach him notwithstanding the fact that the state court had granted a certificate of reasonable doubt and that the conviction had not yet otherwise been reviewed by any appellate court. This was an impermissible burden on Aloï's right to take the stand, Point V(a); the judge's ruling also set up an impermissible conflict between two constitutionally protected rights which requires reversal, Point V(b).

On the eve of trial, after repeated and unhonored requests for bills of particulars, and after a superseding indictment had been returned, the government submitted a list of un-indicted, previously unnamed co-conspirators which drastically broadened the charges against which Aloï had to defend, and which constituted an impermissible prosecutorial amendment of the indictment. These arguments are set forth in Point VI.

During the trial defense counsel obtained evidence showing that the government's lay witness, Hellerman, had lied on the stand as to material facts. This lie went not only to his general credibility, but to an agreement with the government which, in effect, vouched for the honesty of his trial testimony. The trial judge's refusal to permit cross-examination on this crucial issue was reversible error (Point II of Appellant Lombardo's brief, specifically incorporated pursuant to Rule 28(i), F.R.A.P.) as was his failure

to strike the "vouching" in the government's case and summation (Point IV of Appellant Dioguardi's brief, specifically incorporated pursuant to Rule 28(i) F.R.A.P.).

The testimony of the key witness against Aloi, Edward Graifer, case serious doubt as to whether he adequately understood the oath to which he had sworn. The trial judge's failure to conduct a voir dire as to competency or to permit Aloi's counsel to pursue the issue on cross-examination constituted reversible error, as argued in Point VII.

The government completely failed to respond to the defendant's requests for information concerning electronic surveillance and similarly did not comply with the judge's repeated orders for disclosure. This failure, particularly in light of statements and information indicating that wire-taps were extremely likely as to Aloi and Dioguardi, and the strong possibility that wiretaps of Dioguardi's phone would contain crucial exculpatory evidence, requires a remand for determination of the motions and orders (Point V of Appellant Dioguardi's brief, specifically incorporated pursuant to Rule 28(i), F.R.A.P.).

Finally, Aloi was sentenced, not for the crimes of which he was convicted, but for unsupported allegations of membership in organized crime and criminal activity for which he was never charged, tried or convicted. Both the presentence report and the prosecution's written "Recommendations" contained inflammatory, prejudicial and false information which was improperly and unconstitutionally relied upon by the sentencing judge. Aloi's counsel made specific requests for a hearing at which to rebut the false information, but was denied by the trial judge, thus denying Aloi of due process of law at this critical stage of his criminal trial, as argued in Point VIII.

STATEMENT OF FACTS

To avoid unnecessary repetition, Aloï specifically adopts the Statement of Facts contained in the brief of Appellant Dioguardi, pursuant to Rule 28(i), F.R.A.P.

Particular facts as to Aloï, necessary to individual arguments, are set forth in the Points, infra, containing those arguments.

NOTE: References to the trial transcript are denoted by "T."; references to appendix by "A."; references to the jury voir dire by "JT."

POINT I

THERE WAS NO EVIDENCE OF INTENT OR KNOWLEDGE SUFFICIENT TO FIND ALOI GUILTY OF THE CONSPIRACY CHARGED

As Justice Holmes wrote, a conspiracy is a partnership in criminal purpose, United States v. Kissel, 218 U.S. 601, 608 (1910), but that purpose must be specific, United States v. Ingram, 360 U.S. 672 (1960), and must be common to all members of the conspiracy, Blumenthal v. United States, 332 U.S. 539 (1945).

Where a particular defendant lacks either specific intent to violate the statute which is charged as the object of the conspiracy, e.g., United States v. Crimmins, 123 F.2d 271 (2d Cir., 1941), or where he is a member of one of a number of separate schemes alleged as a single conspiracy, Kotteakos v. United States, 328 U.S. 750 (1946), his conviction of conspiracy cannot stand. See generally Developments in the Law; Criminal Conspiracy, 72 Harv.L.Rev. 920 (1959); Note, Federal Treatment of Multiple Conspiracies, 57 Colum.L.Rev. 387 (1957).

The record in the instant case demonstrates both of these fatal flaws as to Aloï's conviction on the conspiracy count. The evidence as to Vincent Aloï,⁵ taken in the light most favorable to the government, can be summarized

⁵There was inevitable confusion at the trial between Vincent Aloï, the instant appellant, and his father Sebastian "Buster" Aloï, who was severed for health reasons. The evidence against Buster was far more extensive than against his son and undoubtedly resulted in some prejudice against Vincent, See Point VIII, *infra*. For purposes of this discussion we will use "Aloï" to the Appellant except where father and son are both mentioned in some testimony, first names will then also be used.

as follows.

Michael Hellerman owed \$10,000 to the defendants Fusco and Savino as a result of a prior legitimate securities transaction involving a stock called Trimatrix. After unsuccessfully attempting to collect this debt, Fusco and Savino requested Aloï to intercede on their behalf.⁶ In January of 1970, months before the conspiracy began, Aloï met with Hellerman and Dioguardi at the latter's office. It was agreed that Hellerman would repay the debt as soon as he made some money (T. 1741).

No money was paid, but in approximately June of 1970, Fusco and Savino learned from Graifer that Hellerman was involved in a new stock transaction.⁷ They asked Graifer if Aloï knew about it. When told that he did not they said they would speak to him, both to see if they would now be able to get their money back, and because they didn't want to see anyone else get hurt by Hellerman (T. 915).

Graifer subsequently heard from Lombardo that Hellerman was no longer going to do the AYSL deal, presumably because of Aloï's intercession (T. 518-19).⁸ Upset because the stock might not go public, and because little

⁶Rather than repeat "allegedly" as to all of the hearsay testimony adduced, appellant here specifically disclaims acceptance of the testimony of Graifer and Hellerman, the only two witnesses who implicated him.

⁷This was, of course, the AYSL deal (set forth at length in the Statement of Facts previously incorporated) in which Dioguardi and Buster Aloï had agreed that Hellerman would sell the AYSL public offering for Graifer and his partners in return for \$45,000.

⁸Hellerman testified he told Dioguardi that Fusco and Savino had poisoned Aloï's mind against him and that was why the deal was stopped (T. 1801). Like Graifer, however, his knowledge that Aloï had "killed" the deal was only third hand (T. 2559).

time was left to sell it under the SEC exemption, he immediately went to Florida to obtain assistance from Buster Aloï.⁹

After Graifer told Buster what had happened, Buster called Vincent,¹⁰ spoke to him in Italian, and told Graifer that everything would be all right.¹¹

When he returned to New York, Graifer was told by Hellerman that he was again going to do the "deal" but that Savino and Fusco would have their debt repaid out of his \$45,000 (T. 520-21), as a result of an agreement between Aloï and Dioguardi (T. 1830).¹²

As set forth in the state of facts, Hellerman then¹³ proceeded to manipulate and sell AYSL stock until the bogus "closing" was held on July 28. Shortly thereafter Graifer paid Hellerman the \$45,000 which had been previously agreed upon.

Hellerman then took the money to Dioguardi who took it to

⁹Buster was the person who had initially told Graifer to go to Hellerman to have the offering sold.

¹⁰See Point III, infra.

¹¹Graifer did not, of course, understand anything what was said, and Buster did not enlighten him as to how things would be taken care of, or whether Vincent would speak to anyone (T. 1248).

¹²Hellerman testified that shortly after this he had a chance meeting with Fusco who invited him to have a drink with Aloï. Aloï inquired as to how things were going and whether Fusco would be repaid. When Hellerman said yes, Aloï said, presumably referring to the Trimatrix fiasco, "For once let's do something right. For once, you know, let's make sure my boys get their money back" (T. 1850).

¹³All of this occurred after July 7, the final date on which the stock could legally be sold. See Point III(4), infra.

Aloi.¹⁴ Aloi "distributed" it as follows: \$25,000 to Dioguardi, \$10,000 to Lombardo¹⁵ and \$10,000 to Fusco and Savino (T. 1879).

Following the closing, Hellerman began a second phase, or after-market manipulation, which was completely unknown to Graifer and presumably to the other "conspirators."¹⁶

In September of 1970, when Graifer was called before the SEC¹⁷ he learned for the first time that Hellerman was selling far more than the 50,000 shares accounted for at the closing. In fact, some 137,000 shares, more than the total public offering of AYSL were being traded (T. 599). Faced with this startling discovery, Graifer realized that he had ". . . joined the ranks of those who were swindled by Mike Hellerman" (T. 599).

On September 17, the following day, he went to the Tamcrest Country Club where Aloi was having lunch.¹⁸ Graifer told Aloi what had occurred. Aloi said that he would get ahold of Johnny [Dioguardi] and that it would all be worked out (T. 604). He also told Graifer not to have any further contact with Hellerman (T. 655).

¹⁴There are at least four different versions of what happened to the \$45,000. Three do not include Aloi at all. We are deliberately, as in the rest of this summary, offering the version most damaging to Aloi.

¹⁵In repayment of a prior loan from Lombardo to Hellerman.

¹⁶With the exception of Schoengold and Bald, who were part of his "team" during this operation.

¹⁷Hellerman got him a lawyer and told him to say that they had met through the people at TDA (T. 584).

¹⁸A lunch check signed by Aloi with that date was the single piece of non-hearsay evidence which was claimed to connect Aloi to the conspiracy.

Graifer's conversation with Aloï occurred in Florida in December of 1970. On that occasion Aloï told Graifer that he couldn't reach Johnny, that he was sorry he'd ever gotten involved since "all Michael Hellerman ever does is bring aggravation" (T. 611). He also complained that he'd gotten nothing out of the whole business, and that he had only gotten involved because his father asked him (Id.).

Later in December, Graifer was called before the SEC for a second appearance. He told the Commission that if they would give him a list of lawful stockholders he would return all of their initial investments (T. 899).

This repentent gesture followed Graifer's discovery that not only had he been swindled, but that the entire AYSL offering may have been illegal.

Hellerman corroborated the crucial fact of this late discovery. He had loaned Graifer \$37,500 sometime during the period of the after-market manipulation. When Graifer did not repay the loan, he went to Dioguardi. As he testified,

Johnny told me that [Lombardo] and Benny Aloï¹⁹ had come up to see him in his office and they had told Johnny that Eddie Graifer's lawyer, or At-Your-Service Leasing's lawyer, had told Eddie Graifer that he would be obligated to pay back the whole \$150,000 that he had gotten from the offering because it wasn't a proper offering and it was illegal.²⁰ And for that reason, on that basis, that Vinny Aloï had instructed Benny and [Lombardo] to come up and see Johnny and tell him they

¹⁹The brother of Appellant Vincent Aloï.

²⁰This is presumably because the stock was sold after the exemption expired and was thus unregistered and within the prohibition of 15 U.S.C. Section 77(e).

weren't going to allow him to return the \$37,500;²¹ that they were going to hold on in case Eddie Graifer or At-Your-Service had to pay back the \$150,000 to the people that bought the stock.

[T. 1907-08]

- (a) The requisite specific intent was not established as to Aloï

It is settled beyond question that:

Where the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. That has been the position of this Circuit, at least since Learned Hand's opinion in United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941), and the principle has been reaffirmed by this Court's recent decisions.

[United States v. Cangiano, _____ F.2d (2d Cir., 1974), slip. op. 5665, 5669-70, citations omitted]

Mere knowledge of general criminal activity is not enough, e.g.,

United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir., 1970); United States v. Dennis, 302 F.2d 5 (10th Cir., 1962). Thus, where an indictment charges conspiracy to transport stolen goods, a defendant must be found to have specific knowledge as to the substantive offense, not only that the goods were stolen, but

²¹The government offered as consciousness of guilt a 1971 post-conspiracy conversation between Graifer and Aloï in which Aloï allegedly told Graifer that he wanted the \$37,500 (T. 617) because he'd had so much aggravation. This statement, demonstrates absolutely nothing about the crucial issue of Aloï's intent during the period of the conspiracy alleged. At most it suggests that, once having discovered that there had been a stock swindle and everyone had benefited, he wanted a cut for himself. Appellant does not concede, of course, either that the conversation took place or that he had such post-conspiracy knowledge.

that they were in interstate commerce. United States v. Houle, ____ F.2d ____ (2d Cir., December 27, 1973), slip. op. 985, 981.

And, where specific intent is required, the judge's charge must instruct the jury that the element of actual knowledge must be found. Cangiano, supra, at 5671; United States v. Falcone, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940). The failure to so charge is itself "plain error" even when no such charge is requested by counsel, e.g., United States v. Houle, supra.

We believe that the failure to charge as to the specific intent to violate the statutes charged in count 1, and the absence of any charge on wilfulness is itself, enough to reverse the conviction on this count. This argument, fully set forth in Appellant Dioguardi's brief at Point I is here specifically adopted and incorporated, pursuant to Rule 28(i), F.R.A.P.²²

²²We would make one addition to that argument. The judge charged that the principal unlawful objectives of the conspiracy were "violation of the securities laws of the United States and of its mail fraud statutes" (emphasis added). He went on to charge: "... as a matter of law that the objectives of this conspiracy as described by the government, namely, obtaining moneys from the public by fraudulently pumping worthless securities into the ordinary channels of commerce could not be accomplished without violating the above mentioned statutes and you would be entitled to conclude that any defendant whom you find to have intended such objectives, must have contemplated the violation of those statutes." (A. 98; emphasis added). The only "securities" law of the United States defendants were charged with conspiracy to violate was the anti-fraud provision of the Securities Act of 1933, 15 U.S.C. Section 77(a). However, as set forth more fully in Point II(4), the proof at trial showed that the statute actually violated was 15 U.S.C. Section 77(e), prohibiting sale of unregistered securities. Since the jury was told only that it was a violation of unspecified Securities laws, and may well have found violation of 77(e) which was not charged in the indictment, it is almost certain that the defendants were convicted of conspiracy to commit a crime with which they were not charged, requiring reversal, e.g., United States v. Stirone, 361 U.S. 212 (1960).

However, even apart from the totally inadequate charge, there is absolutely no evidence to show that Vincent Aloï had a specific intent to violate Section 77(g) of the Securities Act or even that he had knowledge of the conspiracy charged in the indictment.²³

All the evidence adduced against Aloï demonstrated no more than a continuous and ultimately successful attempt to obtain repayment of Hellerman's debt to Fusco and Savino. There is no evidence that he knew how²⁴ Hellerman was going to obtain money to repay the debt; there is no evidence that he cared.

In fact, the evidence indicates that it was only after Hellerman's "swindle" was completed that Aloï knew that anything illegal had occurred;²⁵ surely his statement that Graifer would have to pay back AYSL's investors if it turned out that the stock offering wasn't "proper" negates any inference of prior knowledge of the parameters of the "deal"²⁶ much less any specific

²³For example, as more fully set forth in Point II, infra, there is absolutely no evidence that Aloï even knew of the existence of the false offering circular which the indictment alleged not as an overt act, but as an unlawful objective of the conspiracy.

²⁴We can infer that he had knowledge that Hellerman was engaged in another stock transaction, but this is very different from knowledge that it was a legally fraudulent one. It must be remembered that the deal which generated the debt in question was perfectly legitimate; it was merely financially unsuccessful. Aloï (along with Fusco and Savino) may well have assumed that the new "deal" was similar to Trimatrix, but hopefully more profitable.

²⁵While Graifer himself, surely a prime mover in this venture, knew it wasn't "clean" as early as mid-May (T. 862) even he did not understand that what was happening was, technically, a "fraud" (T. 865, 867-70).

²⁶At one point Mr. Klein argued that the word "deal" was being used in so many different ways that jurors could not help but be confused (T. 1838-39). This was an understatement. At various times, and between various people, it meant, inter alia, the stock offering itself, the agreement Dioguardi and Buster Aloï that Hellerman would sell the offering, and the agreement between Vincent Aloï and Dioguardi that Hellerman would repay Fusco and Savino.

intent to violate particular provisions of the securities law.

The very worst which can be inferred is that Aloï knew that some kind of stock swindle was going on. But,

[mere knowledge, approval or acquiescence
in the object or purpose of a conspiracy does
not make one a conspirator.

[Dennis v. United States, supra]

To be guilty of conspiracy to commit a crime, one must know the crime contemplated, e.g., United States v. Crimmins, and must make the goals of the conspiracy one's own, e.g., United States v. Peoni, 100 F.2d 401, 402 (2d Cir.). Like United States v. Gallishaw,²⁷ supra, the failure of proof as to these essential elements requires reversal in the instant case.

(b) The existence of multiple conspiracies
requires reversal of the conviction.

It is hornbook law that where an indictment charges a single conspiracy and the proof discloses separate agreements with separate ends, conviction on that conspiracy charge must be reversed. Kotteakos v. United States, 328 U.S. 750 (1956). See Note, Federal Treatment of Multiple Conspiracies, 57 Colum.L.Rev. 387 (1957); Developments in the Law, Criminal Conspiracy, supra.

²⁷In Gallishaw, the appellant unlawfully supplied co-defendants with a machine gun. When he handed it over, one of the recipients said he would either "pull a bank job" or "pull something else." A bank was subsequently robbed and Gallishaw was charged with conspiracy to commit bank robbery. This Court reversed finding that a conspiracy conviction could not be sustained if the jury found only that "there was a conspiracy to do something wrong and to use the gun to violate the law." Gallishaw, supra, at p. 762, 763. Here, where Aloï did not even supply a metaphorical "gun" to aid Hellerman's similarly undefined "deal" the result must be the same.

This is because prejudice inevitably occurs when the government prosecutes multiple conspiracies and schemes, each of which does not involve all of the defendants, as one single scheme and conspiracy, e.g., United States v. Goss, 329 F.2d 180 (4th Cir., 1964); United States v. Russano, 257 F.2d 712 (2d Cir., 1958).²⁸

Whether multiple or a single conspiracy exists is a question which can only be answered by examination of the agreement which is the essence of the conspiracy. United States v. Varelli, 407 F.2d 735, 747 (9th Cir., 1969); Note, 65 Northwestern L. Rev. 134 (1970). To sustain the finding of a single conspiracy, the agreement must meet the common objective tests, cf. Blumenthal v. United States, 332 U.S. 539 (1945). Similar objectives are not enough,²⁹ e.g., Kotteakos, *supra*; Rocha v. United States, 288 F.2d 545 (9th Cir., 1961).³⁰ An overall conspiracy exists only when it is shown that the participants are interested in the same objective and all expect to share in its accomplishments. United States v. Varelli, *supra*.

²⁸As this Court found, if multiple conspiracies are found, and an individual defendant is a member of only one of those conspiracies, evidence with regard to the others, admitted pursuant to the general conspiracy hearsay exception, has been impermissibly admitted as to that individual.

²⁹This is often the failure in so-called circle conspiracies where a number of persons (the "spokes") are engaged in similar relationships with the same individual or group (the "hub"). In order to form a single conspiracy, each spoke must know the existence, or likely existence of others. Federal Treatment of Multiple Conspiracies, *supra*, at pp. 388-89. Kotteakos is a classic circle conspiracy case.

³⁰The indictment charged a conspiracy to defraud the United States through the use of sham marriages. Although an indicted co-conspirator was either responsible for, or a witness at each of six marriages, the court found six separate conspiracies because each "married couple" was not "interested in any marriage but [its] own."

Applying this test to the facts in the instant case compels the conclusion that there were a number of agreements, each with its own participants, and with separate and sometimes quite conflicting objects.

Graifer and the accountants wanted nothing more than that AYSL go public to relieve certain pressures on them; Graifer at least testified that he had no desire to make any money. Graifer's agreement with Lombardo and Buster Aloï was that they would get Hellerman to sell the offering for him.³¹ Whatever the terms implied or proposed by Hellerman of the final agreement can hardly be said to have been common since, as Hellerman testified,

I conned Graifer, so I don't remember
what I said to him.

[T. 2006]

The agreement between Aloï, Fusco and Savino was that Aloï would attempt to obtain repayment of Hellerman's debt to them.

The agreement between Aloï and Dioguardi was that Hellerman would repay the loan when he was able without references to the means by which he would obtain the funds.

The entirely implied agreement between Vincent and Buster Aloï was that in return for Hellerman's repayment of the loan, Vincent, Fusco, and Savino wouldn't "kill" the deal he, Dioguardi, and Hellerman had made.³²

The king-pin, Hellerman, made so many deals and double-

³¹Obviously, selling unregistered stock, requiring the return of investors' money, was not the objective of this agreement.

³²Not "killing" a deal and promoting it are obviously two very different things.

deals³³ with individual co-conspirators and groups of co-conspirators that he couldn't even remember them all.

Whatever the ultimate number of conspiracies, agreements, or the like which can be extracted from this whole sorry story, one fact is clear. Michael Hellerman's objective³⁴ was not Vincent Aloï's objective. If Aloï was involved in any conspiracy³⁵ it was not the conspiracy alleged in the indictment.

The existence of multiple conspiracies is a fact question for the jury. When the possibility of more than one conspiracy appears³⁶ the judge must instruct the jury accordingly. United States v. Borelli, 336 F.2d 376 (2d Cir.) cert. denied sub. nom Mogavero v. United States, 379 U.S. 960 (1965). See United States v. Varelli, *supra*; United States v. Griffin, 464 F.2d 1352 (9th Cir., 1972).

The jury in the instant case was never apprised that it must make the crucial determination as to whether the government's evidence proved the

³³Nelson of TDA, a co-conspirator, was so "conned" by Hellerman (T. 2821-22) that TDA was left holding the bag on the AYSL after market manipulation causing the company to go out of business. Whether individual co-conspirators knew that anything illegal was going on, or what the extent of the illegality was, depended in large part on what Hellerman told them. For example, Hellerman testified that despite his extensive involvement in the after market manipulation, Schoengold never knew that what he was doing was illegal (T. 2022).

³⁴Which was, by his own admission, to make as much money as possible for Michael Hellerman, regardless of the consequences to anyone else.

³⁵Mr. Lewis suggested that there might possibly be a state crime of extortion of debt or something similar; Aloï does not, of course, concede this, but it does demonstrate how far his intent and actions were from wilful violation of the securities law and the use of a false offering circular.

³⁶This is often discussed in terms of variance from the indictment.

existence of one conspiracy and scheme or several.³⁷ Had it been, as argued above, there is every likelihood it would not have found Vincent Aloï guilty of the single conspiracy alleged in the indictment. The trial court's failure to charge properly on this issue itself requires reversal.

For all the reasons set forth above, Aloï's conviction on count 1 must be reversed.

³⁷Thus, contrary to Kotteakos and its progeny, the jury could have found the various defendants guilty just because of one central figure, Hellerman, was involved in all transactions.

POINT II
ON THE FACTS AND UNDER
THE APPLICABLE LAW,
THE CONVICTION ON
COUNT 18 CANNOT STAND.

The "use" of a false and misleading offering circular,³⁸ in violation of 15 U.S.C. section 77 S(a), Rule 256(e) [17 C.F.R. section 230.256(e)] and Form 1A, Schedule I, as promulgated thereunder was charged both as an object of the conspiracy under Count 1 (A. 15-16) and as a substantive crime under Count 18 (A. 34-35).

The guilt of the instant defendants on the substantive count was predicated entirely on the derivative liability of Pinkerton v. United States, 328 U.S. 640 (1946) (See A.101), and thus required a finding both (1) that the crime was actually committed, United States v. Cantone, 426 F.2d 902, 904 (2d Cir., 1970) and that it was committed in furtherance of the conspiracy, Pinkerton, supra. A careful examination of the facts adduced at trial demonstrates that neither of these requirements was met and that accordingly, a properly instructed jury³⁹ could not have found the defendants guilty.

³⁸The indictment correctly used the term "offering circular" although throughout the trial there was substantial confusion and improper substitution of the term "prospectus." The latter, a more complicated document, is required for the sale of registered stock; the simplified "offering circular" is required for the sale of stock exempted from registration. As the facts will demonstrate, this distinction between registered and exempt stock is crucial; the confusion in the terms prospectus and offering circular merely mirrors the erroneous blurring of that distinction.

³⁹An extensive discussion of the impropriety of the court's charge on count 18 is included in Point I of Appellant Dioguardi's brief on Appeal, here expressly adopted pursuant to Rule 28(i), F.R.A.P. We believe that the grossly improper and inadequate charge alone requires reversal; [cont'd next page]

Briefly, our contentions are these:

(1) The offering circular contained no material misrepresentations which might have affected the judgment of prospective purchasers;

(2) None of the alleged misrepresentations were "wilfully"⁴⁰ made;

(3) The offering circular was never "used" nor was it an instrumentality of the alleged conspiracy;

(4) The offering circular itself, and the statutory requirements surrounding it, became completely irrelevant since no exempt stock was ever sold; and

(5) The "issuance" of the offering circular was completed long before appellants entered the alleged conspiracy and cannot be criminally attributed to them on a theory of derivative liability.

(1) Material Misrepresentations

Sometime after July 28, 1969,⁴¹ in accordance with SEC regulations (T. 258), Andrew Nelson and Gerald Miller drew up an offering circular for AYSL, after receiving the necessary background from the accountant prin-

the facts, as set forth infra, amplify that contention and provide another ground for setting aside the conviction on this count.

⁴⁰ As more fully discussed in Appellant Dioguardi's brief at Point I, the Securities Exchange Act of 1933, 15 U.S.C. 77(a), et seq., which permits various civil remedies including injunctive action. It is only Section 77(x) which makes violation of the Act criminal; that section specifically requires wilfulness as opposed to carelessness, mistake or the like.

⁴¹ This was the date on which AYSL and Tech-Ec entered into an agreement under which Tech-Ec would do all necessary work to take AYSL "public" (T. 2697-98) for the sum of \$20,000.

ciples (T. 2701). This offering circular was duly filed with the SEC which, in the normal course of events, returned it for "necessary corrections" which were made (T. 2701-02).

When Daniel Securities, originally named as underwriter, went out of business, Nelson took the offering circular to Donald Fisher of TDA Securities. After reviewing the circular Fisher concluded that the company was "pretty bad" (T. 3182) but agreed to act as underwriter because of a general agreement with Nelson (T. 3180). The offering circular was amended to show TDA as underwriter (T. 3185); this version of the offering circular was the final one; it is set forth in the Appendix at pp. 46-64.⁴²

Graifer believed the offering circular gave an accurate picture of the company such that prospective buyers could look at it and make up their own minds (T. 677-81). The picture given was indeed so accurate⁴³ and so bleak that no buyers ever appeared. It was this complete failure to sell the issue in the regular channels of business which led Graifer to seek out Sebastian Aloï and, ultimately, Hellerman.

⁴²We strongly urge the Court to carefully read the circular. Any such reading convinces that the statements made about the company and its abysmal condition give an accurate picture, based on that picture, no investor in her or his right mind would possibly buy the security.

⁴³As the circular shows, AYSL's cash balance was \$158.00, its deficit \$103,199.00. The circular points out on its very front page, "these securities involve a high degree of risk," "immediate substantial dilution to public investors," "significant additional underwriting compensation," "there has been no previous market for the company's securities," and "there is no assurance that such a market will develop." (A. 64) The "Risk Factors to be Considered" (A. 66-68), the denial of any intention to pay dividends, the fact that public investors will have no say in electing directors (A. 72), and the statement of financial condition makes it extraordinarily unlikely that any investor would choose to buy AYSL stock.

When Nelson was first introduced to Hellerman (about June 18) the latter held himself out as the head of an investment group which would buy up unsold shares (T. 2776). Graifer similarly believed, at that time, that Hellerman was simply going to buy the stock (883). Graifer had no idea that Hellerman was an "undisclosed underwriter" nor did he know what those words meant (id.). Nelson assumed that Hellerman was an underwriter "more or less" but did not amend the offering circular to indicate the fact (T. 2778).

No proof was introduced that the failure to name Hellerman as an underwriter would have in any way dissuaded otherwise potential purchasers from buying this "worthless" stock, nor could the jury so infer. There were no purchasers.

The other alleged "misrepresentations" are similarly immaterial.

The offering circular did not disclose that Tech-Ec was to be paid \$20,000 for its services; however, the fact that \$20,000 was to be paid out of the offering "for filing, printing, legal, accounting and miscellaneous expenses relating to this offering" was disclosed on the circular's front page.⁴⁴ There was no proof that any prospective purchaser would have changed her or his mind had she or he known precisely where the \$20,000 went, nor can

⁴⁴This breakdown was not itself arbitrary or fraudulent. Nelson testified that by the effective date, the printing expenses alone, which came out of Tech-Ec's fee, exceeded \$5,000 (T. 2710), and Tech-Ec's fee was precisely to take care of those details listed on the offering circular.

any such inference be made. There were no prospective purchasers.⁴⁵

The offering circular did not set forth the fact that "TDA was underwriter in name only and did not intend to make efforts to obtain purchasers for the stock" (A. 35).⁴⁶

TDA relied on the fact that the management of the issuer had substantially placed the issue⁴⁷ (T. 2704); they were willing to, and indeed did perform the technical obligations and paperwork of an underwriter (T. 2704). They also agreed to assist in "making a market" once the issue was effective (id.), which clearly involved "seeking out customers." There was no proof that the fact that TDA was not actively seeking purchasers would have affected the decision of prospective purchasers;⁴⁸ nor can any such inference be drawn. There were no purchasers.

⁴⁵Much was made at trial that the offering circular did not state that Dragani of TDA had been paid \$2,500 "under the table," although this omission was not alleged in count 18. It should be noted, however, that such omission was not criminal conduct. The circular set forth the total amount in commissions to be paid. Fisher of TDA stated that the \$2500 paid to Dragani was an advance against those commissions (T. 3184, 3186), which was not even paid out of AYSL funds, but out of the personal account of one of the accountants (T. 2713). The total amount, in which prospective purchasers would be interested, was not affected.

⁴⁶In fact, Hellerman testified that during the period of the offering, TDA was actually trying to sell some shares (T. 2177).

⁴⁷This is not an unusual occurrence, 1 Loss, Securities Regulation, p. 549 (1961), and does not in and of itself, make the issuer or its employers an underwriter. Id.

⁴⁸The very terms of the mini-maxi offering make this irrelevant, since if the minimum number of shares is not sold (and this is the issue which presumably interests the prospective purchaser, who wishes to avoid being stuck in an undercapitalized company) the purchaser gets his or her money back.

The offering circular did not state that \$45,000 from the proceeds of the offering would be paid directly to Hellerman and indirectly to the defendants (A. 35); this payment, however, was reflected in the circular's statement that the proceeds of the offering would be used to pay off existing debts (A. 68). The \$45,000 drawn from AYSL by Graifer and turned over to Hellerman was actually in payment of debts as set forth in the offering circular⁴⁹ and did not constitute an additional "dilution" in which prospective purchasers might be materially interested. There was no proof that prospective purchasers would have been affected by knowing precisely which creditors would be repaid and in what amounts, nor could there be any such inference. There were no purchasers.

(2) Wilful Misrepresentations

There is no evidence, as required by the statute, that the misrepresentations or omissions set forth in the indictment were wilfully made. Indeed, the evidence is quite to the contrary--that all of those closest to the preparation of the circular believed it was entirely legal. Graifer himself

⁴⁹The \$45,000 which Graifer paid Hellerman came out of Graifer's pocket, not out of the company's share of the offering. The prospectus indicated that as of October 31, 1969 AYSL owed Graifer \$27,150 (A. 74) and that Graifer made periodic loans to the company (id.). It also indicated that, as of that date, the company owed \$114,500 in 10% demand notes to unrelated creditors (A. 68). Graifer had put more than \$100,000 into AYSL (T. 729) and had used that money to pay off the unrelated creditors prior to the offering (T. 908). In other words, he was substituted as creditor but the amount of outstanding obligations remained the same (T. 908-09). The \$45,000 was owed him (T. 906) and the fact that he chose to pay it to Hellerman in no way effected the distribution of the proceeds of the offering as set forth in the offering circular.

testified that even he was not aware that the prospectus (sic) was false or fraudulent⁵⁰ until he was indicted! (T. 880).

Nelson's failure to amend is, from his testimony, due to his sense that the changes made no difference, not to any deliberate intent to mislead.⁵¹ Like everyone else, Nelson knew that purchases would not be made on the basis of the offering circular; his dual belief that it was basically accurate and entirely irrelevant certainly negates any finding of wilful misleading of purchasers through the offering circular.

Other alleged conspirators who saw the offering circular believed that it accurately described the offering as "pretty bad" (Fisher) or "garbage" (Dragani) and there can be no inference that their failure to amend or otherwise change the circular constituted, by them, any wilful misleading.

(3) "Use" of the offering circular

The prime variance between the indictment and the proof was that, in fact, the offering circular was never "used" in any common sense of the term.

After the circular was prepared and filed with the SEC,⁵² it basically

⁵⁰In fact, while Graifer admitted knowing that Hellerman was somehow manipulating the price of the stock, he didn't believe that purchasers who didn't know the true value of the stock would have it "thrust on them" (T. 862) because, he believed, each purchaser would be supplied with the prospectus (sic) and, based on the statements therein, "It was up to the individual to make up his mind." (T. 870)

⁵¹As to this, it is significant that while he admitted a failure to use "due diligence" in investigating AYSL's situation, he stated that due diligence wouldn't have turned up anything that wasn't in the offering circular anyway (T. 2712).

⁵²At that time Hellerman was not in the picture, and the facts which caused the alleged misrepresentation as to him and the \$45,000 payoff had not yet occurred. As set forth in (1) supra, the "misrepresentations" as to the other two facts set forth in the indictment were either not true or certainly not material.

disappears from the case. Fisher saw it after TDA's name was put on it (T. 3185) and Hellerman and Kelsey looked at it at the first, or "Riverboat" meeting (T. 906).

At some time prior to the expiration of the offering, Hellerman gave Nelson a list of purported "buyers."⁵³ TDA then typed up confirmations and placed them, together with subscription forms and offering circulars, in envelopes which Fisher gave to Nelson (T. 3189-90) and Nelson in turn delivered to Hellerman's office (T. 2780).⁵⁴ There they remained, on the couch (T. 2782) presumably until the stock was long since sold and the SEC moved in.

No offering circulars were distributed to purchasers or prospective purchasers within the effective period of the offering because there were no purchasers.

Nor were offering circulars ever delivered to the eventual purchasers of the stock⁵⁵ who were according to Fisher, only mailed confirmations.⁵⁶ The "victims" who testified at the trial all indicated either that they had not

⁵³Actually, of course, this list was totally fabricated. There were no buyers until well after July 7. See (4) infra.

⁵⁴Knowing that there were no "purchasers," but not wanting to tell Nelson this, Hellerman "conned" Nelson by telling him that since it was so close to July 7, he didn't want to trust to the mails and would therefore have the confirmations, et al. delivered from his office (T. 2782).

⁵⁵Who, by this time, were not required to receive "offering circulars" because the stock was no longer exempt from registration under 15 U.S.C. section 77(c). See (4) infra.

⁵⁶Had those sales been legitimate, the failure to enclose offering circulars would have constituted a violation of the statute and regulations which might, if wilfully done, he constituted a crime. Such crime was not, however, even charged in the indictment.

relied on the offering circular in purchasing the stock,⁵⁷ or that they never received or saw a copy of the offering statement.

The stock of AYSL was sold through the after-market rigging of buy and sell confirmations by Hellerman, and by the ring-around-the-rosy manipulation he performed with the help of Schoengold, Bald, et al. It was not sold through the "use" of the offering circulars which never moved beyond Hellerman's office couch.

The facts conclusively demonstrate that the offering circular was never "used" as charged in the indictment.⁵⁸ Similarly, it was not an instrumentality of the conspiracy, because it was not "used" to further its ends. The contents of the circular or lack thereof may not be charged, as a substantive crime under Pinkerton against the other alleged members of the conspiracy because the circular was irrelevant to the conspiracy.

(4) The Wrong Crime

The stock of the AYSL offered to the public was granted a "Reg A" exemption⁵⁹ from the normal registration procedure of the SEC under a

⁵⁷All but one relied on totally false representations made by a broker, Harry Parsons, who was either a friend or relative, and who had apparently been paid by Hellerman. One relied on representations of another broker, Renee DeMarco.

⁵⁸In addition to the obvious meaning of "used" it might be contended that the circular was "used" solely to obtain a Reg.A. exemption. Such "use" would be totally immaterial because no stock was ever sold subject to the exemption. See (4) infra. Further, the exemption was obtained long before Aloï --or any of the instant appellants--allegedly entered the conspiracy. See (5) infra. The facts as adduced at trial suggest that the alleged conspiracy began at the very earliest when Graifer met Buster Aloï in Florida, several months after the exemption was obtained, and subsequent to the effective date.

⁵⁹At that time, as Ms. Appleton, an SEC lawyer, testified "Reg.A" exemptions were allowed for companies whose total offering did not exceed \$300,000. The figure today is \$500,000 (T. 255).

particularly specified condition--i.e., that half of the offering, or 50,000 shares, must be sold within 90 days⁶⁰ or the offer would be withdrawn.

The effective date of the offering, as set by the SEC and stated on the offering circular was April 8, 1970; the final date by which half of the offering had to be sold was July 7, 1970.

An offering circular is required to be filed prior to the granting of an exemption from registration, it must also be delivered prior to or at the time of sale of all exempt stock to which it pertains, 15 U.S.C. section 77(s) [17 C.F.R. section 230.256]. No offering circular is required for the sale of registered stock; in that case a prospectus is statutorily prescribed, 15 U.S.C. section 77(j).

There is no requirement that a prospectus or an offering circular be issued for or distributed in connection with the sale of unregistered, non-exempt securities, because the sale of such securities is itself prohibited by the statute 15 U.S.C. section 77(e).

The evidence in this case conclusively demonstrates that no stock was sold during the 90 day effective period; the failure to sell any shares, much less 50,000 shares, legally resulted in the expiration of any AYSL offering pursuant to Reg. A.

With the possible exception of Morris Winter⁶¹ everyone involved in

⁶⁰The original terms were 60 days; one extension of 30 additional days was permitted (A. 64).

⁶¹Winter testified that he didn't know, prior to the closing, that the mini-part of the deal had expired, but thought July 28 was the last day (T. 3331-32). He did, however, understand the significance of a closing date, although mistaken as to when it was since he understood [cont'd next page]

the bogus closing on July 28 knew that it was illegal.⁶² Hellerman himself put it most succinctly when he stated to the others present that the confirmations would have to be back-dated or "the SEC and everyone else" would know they had been selling unregistered securities (T. 1841-42).

Once the exemption expired, every single share of AYSL stock sold was unregistered, and in violation of section 77(e) of the 1933 Act. The whole issue of materiality or non-materiality, reliance or non-reliance on the offering circular thus was entirely irrelevant. Sale of the stock was a malum in se, which could not be affected by compliance with any reporting provisions. There simply are no reporting provisions for unregistered, unexempt stock, and no statute was violated by the issuance, existence or "use" of the offering circular in the instant case.

(5) Under United States v. Cantone, Conviction of the Appellants on Count 18 Was Improper.

As previously noted, the indictment alleged, tracking the statutory language, that the defendants "wilfully used and caused to be used" a false offering circular.

that without the escrow check he wrote to make up the balance of \$150,000 "they would have had to abort the Reg. A offering and file with the SEC a withdrawal thereof without violating further laws, if they hadn't already done so" (T. 3330).

⁶²e.g., Fisher knew that after July 7 the issue could no longer be sold and had to be withdrawn (T. 3191). Nelson testified similarly (T. 2708, 2803). Graifer knew that the closing was illegal (T. 888) as did Hellerman (T. 1855).

The judge, however, charged as follows:

I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States.

I further advise you, if you find the issuance of the circular was in furtherance of the conspiracy and in the reasonable contemplation of the contemplation (sic) of the conspirators, you may find any defendant whom you may have found guilty of conspiracy, to be also guilty of the crime of issuing the false financial statement alleged in count 18 of the indictment.

[A. 101; Emphasis added]

The judge's consistent and exclusive choice of the word "issuance" rather than "use" is significant--and decisive. Either the charge is completely inadequate in that it fails to set forth the statutory crime⁶³ or it is a permissible narrowing of the indictment (See Point VI, infra) which, on the facts of this case, excludes Aloï and the other appellants from Pinkerton liability.⁶⁴

If, as we suspect, it is the latter, the judge charged only as to "issuance" because it was clear from the evidence adduced at trial that there was any "use" (see supra, pp. 27-29).

⁶³As previously stated, and here reiterated, the omission of wilfulness, itself plain error as argued in Dioguardi's brief and expressly adopted here, see fn. 22, supra, is in and of itself, sufficient to set aside conviction on this count.

⁶⁴As none of the appellants had anything to do with "issuing" or "using" the circular, and as far as we can tell, none of them ever saw it or knew of its existence, liability could only, as the judge saw, have been charged under a Pinkerton theory.

But if issuance of a false offering circular is indeed a crime⁶⁵ then Aloï is not guilty of it, since, at the very latest, the circular was "issued" on April 8, 1970. Even by the Government's theory Aloï did not "enter" the conspiracy⁶⁶ until some time in June, 1970.⁶⁷

It is hornbook law that a defendant may not be found guilty of substantive crimes committed in furtherance of a conspiracy when those crimes were committed prior to that defendant's entry into the conspiracy, e.g., United States v. Cantone, *supra*, at p. 904. See Levine v. United States, 383 U.S. 265, 266-67 (1966) (*per curiam*); United States v. Roberts, 416 F.2d 1216 (5th Cir., 1969); Developments in the Law, Criminal Conspiracy, *supra*, at p. 924.

For the five above stated reasons, and the reasons stated in Appellant Dioguardi's brief at Point II, Aloï's conviction on count 18 must be reversed.

⁶⁵Appellant of course does not concede that there is such a crime; it would be a novel statutory construction indeed. And, of course, even if the 1933 Act could be read to prohibit "issuance," whatever that might mean, that prohibition would become criminal only with the additional requirement of wilfulness.

⁶⁶Aloï, of course, does not concede membership in any conspiracy.

⁶⁷As reflected in the judge's charge that he could not be found guilty of the wire fraud alleged in count 9 -- a phone call in May 1970, when, as the judge charged, Aloï had not yet been brought into the conspiracy (A. 107).

POINT III

ALOI WAS IMPROPERLY CONVICTED ON THE WIRE FRAUD COUNT

Aloi was convicted of one count of wire fraud which alleged a call from his father, Buster, in Florida to Vincent at his home in Suffern, New York.

The sole evidence of this "crime" came from Graifer, who was allegedly with Buster when the call was made. Graifer had gone to Florida because Lombardo told him the deal was off--presumably because Fusco and Savino had demanded that Hellerman repay his debt to them.

Graifer testified that he and Buster were in a hotel cocktail lounge in Miami. Buster gave him a telephone number with a 914 area code, which Graifer dialed. He then handed the phone to Buster who

. . . got on the phone and there was a woman on the phone, I assume. He said, "How are my grandchildren."

He had a few words about his grandchildren and he said, "Is my son home." And he said, "May I speak to him." And then he started to speak in Italian.

[T. 522-23]

Graifer testified that he did not understand Italian and did not know what was said (id.). When the conversation concluded, Graifer testified:

He said to me, "I spoke to my son." He said don't worry about it, everything will be straightened out.

[T. 526]

A conviction based on such entirely inconclusive evidence offends both logic and law. Two separate grounds require that it be set aside.

- (a) The judge's charge failed to define the crime, and, in fact, misled the jury as to what was required to convict.

The wire fraud statute, 18 U.S.C. section 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

There are thus three essential elements which a jury must find to convict, i.e.:

(1) The existence of a scheme to defraud.⁶⁸ e.g. United States v. Houlihan, 332 F.2d 8 (2d Cir.), cert. denied, 379 U.S. 828 (1964).

(2) The use of the wires in execution of that scheme.⁶⁹ e.g. Osborne v. United States, 371 F.2d 913 (9th Cir., 1967); and

(3) The normally required specific criminal intent to violate the statute, e.g. Fineberg v. United States,⁷⁰ 393 F.2d 417 (9th Cir., 1968).

⁶⁸The particulars of the scheme must also be charged and found, e.g., United States v. Mercer, 133 F.Supp. 288 (N.D.Cal., 1955), citing United States v. Hess, 124 U.S. 483, 488-89 (1888) a mail fraud case whose rationale is, by statutory constriction and legislative history, applicable to wire fraud cases. Mercer, supra at p. 289.

⁶⁹In this respect, mail or wire fraud offenses differ from the anti-fraud sections of the Securities Act; in the former case it is the use of mails or wires to execute a scheme which is outlawed, in the latter, the mails or wires merely give a jurisdiction basis, Matthews, supra, at pp. 921-22.

⁷⁰The Court wrote "It was essential that the Government prove beyond a reasonable doubt that Appellant acted with specific intent to execute or carry out the scheme to defraud." Id. at p. 418.

In order to appraise a jury of the three specific elements, judges generally charge essentially in the language of the statute itself, see United States v. Hoffman, 415 F.2d 14, 20 (7th Cir., 1969), cert. denied, 396 U.S. 958 (1969).

Judge Knapp, however, submitted the wire fraud count to the jury in an entirely different theory.

First, he never charged criminal intent, because he submitted all substantive counts to the jury in the Pinkerton theory of vicarious liability.⁷¹ There is an integral difference between the degree of intent necessary to commit the substantive crime of wire or mail fraud and that necessary to engage in an act in furtherance of a conspiracy. By his charge, the judge permitted the jury to substitute the finding of an overt act for the commission of a crime,⁷² a clearly impermissible confusion.

His charge as to the particular offense was as follows:

I now turn to counts 10 and 11 of the indictment. Those counts allege that the defendants on trial are guilty of the use of interstate telephone equipment in furtherance of their unlawful scheme to defraud. [The first conversation was as follows.] Some time in June of 1970, it is claimed there was

⁷¹"If you find that one or more [defendants] are not guilty, or that there is reasonable doubt on that subject, your task is finished as to such defendant or defendants, because under the theory I am submitting this case to you, no defendant can be convicted of a so-called substantive crime unless he has first been found guilty of conspiracy." (A. 99-100; Emphasis added).

⁷²Even under the Pinkerton theory someone must first have committed on the substantive crime with specific criminal intent; only after the crime is itself found, may vicarious liability be applied. United States v. Cantone, supra. Here there was never any charge that the crime must be found.

a telephone conversation between Sebastian Aloï in Florida and Vincent Aloï at 6 Maurice Lane, Suffern, New York.

You will recall what these calls are claimed to have been about.

I charge you as a matter of law, if you find those calls to have been made and you find they were made in furtherance of the unlawful scheme to defraud alleged in the indictment and that such telephone calls were within the reasonable contemplation of the conspirators, you may find guilty of counts 10 and 11,⁷³ any defendant whom you have already found guilty of conspiracy.⁷⁴

(A. 106-07; Emphasis added]

As in the conspiracy charge,⁷⁵ the scheme to defraud was in no way described, nor was it indicated that it must already be in existence, e. g., United States v. Buckner, 108 F.2d 921, **925** (2d Cir., 1940). ("It was not enough that there was evidence of a scheme to defraud, but that the mails were used after the scheme was born."). The jury thus need not have found the existence of a particularized scheme, as required by United States v. Fineberg, supra; United States v. Houlihan, supra; United States v. Mercer, supra.

⁷³Count 11 was an alleged call from Dioguardi to Buster Aloï in June 1970. No one was convicted on this count and it will not be discussed herein further.

⁷⁴Obviously the jury totally misunderstood or disregarded these instructions as to Pinkerton since they found all four defendants guilty of conspiracy, but found only Aloï guilty of the "call" in which he allegedly participated. The failure to find the other conspirators guilty when guilt could only, by the judge's charge, be premised on vicarious liability, demonstrates graphically the confusion this charge engendered and the obviously impermissible standards the jury applied. The jury could only have found Aloï guilty if it found the elements to be (1) existence of the call, (2) in furtherance of the conspiracy, without any criminal intent whatsoever.

⁷⁵See Point I of Appellant Dioguardi's brief, incorporated by reference, supra.

Finally, the judge never charged that the call must be in execution of the scheme, but rather in furtherance thereof. This variance was fatal. The statutory choice of language reflected a particularly defined act--one which was actually an integral part of the scheme. The language "in furtherance" requires an act far less directly connected to the object of the fraud, even as an act "in furtherance of a conspiracy" need not be one which directly effectuates the conspiracy's purpose.

Common usage of the terms "in execution of" and "in furtherance of" clearly imply different meanings. See Mitchell v. United States, 394 F.2d 767 (D.C.Cir., 1969).⁷⁶ The judge's charge, omitting the statutory language, thus expanded the crime beyond what Congress intended. See Morisette v. United States, 342 U.S. 246 (1952).⁷⁷

(b) The prosecution failed to prove an essential element of the crime.

In convicting Vincent Aloï of count 10, the jury apparently found that the call alleged took place. It did not and could not, however, determine the content of that call and therefore could not legally find that it was made in

⁷⁶The Court was there concerned with differing meanings of "steal," "purloin," and "larceny." The Court found that even where such words have everyday meanings, those meanings must be charged lest the "jurors, lacking guidance, may [attribute] to the words a connotation not legally acceptable," Id. at p. 769. Hence, ". . . the judiciary should be hesitant to depart from a literal reading of a criminal statute," Id. at p. 772.

⁷⁷The Court there wrote: "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly [citations omitted] admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminatory components contemplated by the words used in the statute." Id. at p. 263.

execution of a scheme to defraud.

All we know about the call is that Sebastian Aloï spoke to someone⁷⁸ in Italian and, after the conversation, told Graifer that everything would be straightened out.

Sebastian Aloï may have said any of a number of things to his son;⁷⁹ the record does not reflect which if any of these may have occurred. Criminal guilt may not be premised on such speculation.

The Government must prove not only that a phone call is made, it must prove its content. Osborne v. United States, 371 F.2d 913, 927 (9th Cir., 1967). Where the purpose of a telephone call alleged as a wire fraud is unclear, conviction on that count will be set aside, United States v. Marino, 421 F.2d 640, 641 (2d Cir., 1970) because it cannot be established whether the call was "for the purpose of executing [a scheme to defraud]," Id. at 641. As the Ninth Circuit wrote in Osborne:

We know telephone calls were put through on certain days but do we know their content? Do we know that the messages transmitted had the purpose of executing a scheme and artifice to defraud when we cannot anywhere find what was said? . . . we cannot assume an unknown . . . conversation had an unlawful purpose without a record to support that assumption.

[Id. at p. 929]

⁷⁸The fact that Sebastian asked for "his son" does not, of course, prove that he got him, nor does it prove which of his four sons, if any, he reached.

⁷⁹For example, he might merely have told Vincent that Fusco and Savino were liars and had already been paid off. He may have asked Vincent simply to stay out of the whole business. He may not have referred to Fusco and Savino at all. He may have referred to some other scheme, or no scheme. He may simply have been conning Graifer.

The holding in those cases control here, and accordingly, conviction on the wire fraud count must be reversed.

POINT IV

ALOI WAS DENIED DUE PROCESS AS A RESULT OF CUMULATIVE PREJUDICE FROM BEING TRIED WITH APPELLANT DIOGUARDI

The Appellant Dioguardi, better known as "Johnny Dio," is, justly or unjustly, a well-known figure. His alleged participation in various racketeering crimes, and his purported high position in the Mafia have made his name something approaching a household word. A fortiori, his presence as a co-defendant in a criminal trial must inevitably result in a certain spill-over prejudice which reflects on the other defendants. Such was the case here.

The existence of real prejudice is not based on speculation but is amply supported by the record, see infra. As the trial progressed, the prejudice increased. The judge had a number of remedies⁸⁰ available to erase or ameliorate this prejudice in its several forms, but declined to employ any of them. The net effect was to deny Aloï a fair trial.

For the purpose of organization, the areas in which prejudice occurred or was improperly dealt with will be divided into jury selection, trial and charge.

⁸⁰i.e., severance, change of venue, separate peremptory challenges for antagonistic defendants, evidentiary limitations, charge, etc. Proper motions were made as to all of these remedies from the beginning of the trial and renewed whenever necessary or appropriate.

A. Jury Selection

From the beginning of the jury selection all counsel, save Mr. Goldberg, repeatedly requested severances from Dioguardi⁸¹ (e.g. JT 116, 161, 166, 192, 214, 227)⁸² as it became increasingly apparent that a very high percentage of jurors had heard of Dioguardi and associated him with the Mafia and/or other particular crimes.⁸³ In all, twenty-three jurors of a total venire of sixty admitted⁸⁴ to having read or heard about Dioguardi in one of these connections. Of these fourteen were excused for cause,⁸⁵

⁸¹The failure to grant these and subsequent motions for severance are discussed infra at (B).

⁸²References are to the minutes of jury selection which are separately paginated from the trial minutes and which will be designated "JT" followed by the page number. The minutes of jury selection are part of the Supplemental Record on Appeal.

⁸³The prospective jurors described Dioguardi as, inter alia, an underworld figure (Rebecca Rouse JT 292-98); a member of the Mafia (James Weissensce JT 96-100); a Mafia "boss" (Jane Waters, JT 88-89). He was associated with "the syndicates" (Louis Armetta JT 415-16), the "rackets" (Celio Garcia, JT 445), and connected with crimes involving the Teamsters Union (Ruth Ramsay, JT 408); waterfront unions (Winifred Mullen, JT and securities fraud (e.g., Lucy Chin, JT 212-14, Ruth Gordon, JT 360, Irene Hudson, JT 336). Others recognized Dioguardi's name and simply associated it with "doing something wrong" (e.g. Mary Beobide, JT 193-97). One, Lucy Chin, actually asked to be excused for fear of serving on a jury which was to sit in judgment on Mr. Dioguardi (JT 212-14).

⁸⁴Because of differences in approach between Mr. Goldberg and counsel for other defendants, and the latter's obvious apprehension about calling undue attention to Dioguardi, no special or probing voir dire was undertaken as to juror's knowledge of him, other than the general list of defendants, witnesses, etc. on which his name appears. It seems fair to assume that more jurors than those which came forward had read or heard about him in some no doubt unsavory connection.

⁸⁵i.e., Chin, Peyer, Ramsey, Armetta, Gamore, Waters, Levinson, Williams, Gordon, Weissensce, Alkalay, Beobide and Garcia and Burke.

seven were excused by peremptory challenge,⁸⁶ and one juror, #12,

Winifred Mullen, actually sat on the jury.

The large percentage of potential jurors who were in one way or another already prejudiced against Dioguardi thus effectively denied the other defendants a full venire from which to make their selection.

Further, and equally prejudicial, the judge ruled that defense counsel must employ their peremptory challenges⁸⁷ unanimously. At a certain point about half way through the jury selection, the complete antagonism of counsel's choices became apparent--with Mr. Goldberg willing to retain jurors who admitted they knew of Mr. Dioguardi⁸⁸ and all other defense counsel anxious to challenge them. Based on these antagonistic positions, Fusco's lawyer moved for a severance or for a continuance of six months until the pre-trial publicity⁸⁹ died down (JT 227-30). After the judge refused to divide up the defense challenges and required them to be exercised jointly, Alois's counsel moved for a mistrial or severance (JT 322) a similar motion for mistrial was made by Mr. Klein (JT 331) and finally Mr. Goldberg moved for severance and change of venue on behalf of Mr. Dioguardi (JT 407). All motions were

⁸⁶Lowery, Buch, Hudson, Tailorocie, Rous, Chilcote, and Crillo.

⁸⁷After much colloquy, and finally by agreement, the defense was awarded twenty peremptory challenges and the prosecution twelve, thus doubling the number but maintaining the ratio allowed by Rule 24(b).

⁸⁸On, for him, the eminently reasonable ground that jurors who admitted what he believed most of them knew were more likely to give his client a fair trial.

⁸⁹At one point there was mention of "an epidemic" of people talking about Johnny Dio (JT 268). There was also substantial pre-trial publicity, but Alois does not here urge that as error per se.

denied, the jury was empanelled, and the trial begun.

The use of peremptory challenges has long been recognized⁹⁰ as an integral element in the constitutional guarantee of a fair trial. As the Supreme Court has written:

The right of peremptory challenge is given, of course, to be exercised in the party's sole discretion. The right is given in aid of the party's interest to secure a fair and impartial jury . . . to afford [a defendant] an opportunity beyond the minimum requirements of fair selection to express an arbitrary preference among jurors properly selected and fully qualified to sit in judgment on his case.

[Frazier v. United States, 335 U.S. 497, 506 (1948), reh. denied, 336 U.S. 907 (1949)]

The general right to peremptory challenges is set forth in Rule 24(b) of the Federal Rules of Criminal Procedure, which provides, in relevant part,

If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

[Emphasis added]

Most of the case law in the area deals with requests for additional challenges where there are multiple defendants,⁹¹ but there is very little

⁹⁰For a history of the peremptory challenge, see Swain v. Alabama, 380 U.S. 202, 213-19 (1965).

⁹¹The advisory committee recognized that the old fiction that multiple defendants were a "single party" in terms of their interests was just that. Accordingly they provided a judge flexibility in allowing some number of additional challenges, stating, "[e]xperience with [cont'd next page]

discussion of the problem of conflict among co-defendants in the exercise of such challenges. Perhaps this is because, faced with possible conflict, trial judges generally exercise their discretion and allow separate defendants to separately exercise at least some of the challenges allotted them, e.g., United States v. Projansky, 465 F.2d 123, 139-40 (2d Cir., 1972), cert. denied, 409 U.S. 1006 (1973) (each of 8 defendants given 2 challenges); United States v. Coleman, 340 F.Supp. 415 (E.D.Pa., 1972), aff'd, 451 F.2d 1337, cert. denied 411 U.S. 939 (1973) (each of 2 co-defendants allowed 5 peremptories).

Those cases where separate challenges were denied have, generally, involved neither motions for severance, e.g., Weems v. United States, 361 F.Supp. 922, 928 fn. 7 (D.Md., 1973), specific claims of prejudice, see United States v. Crutcher, 405 F.2d 239 (2d Cir., 1968), cert. denied, 394 U.S. 908 (1969), nor demonstrable conflict among defendants, e.g., United States v. Gradsky, 342 F.2d 147, 152 (5th Cir., 1965).⁹²

cases involving numerous defendants indicates the desirability of this modification." Notes on the Advisory Committee on Rules, Rule 24, sub b. 18 USCA. Fed. Rules Crim. Proc.

⁹²Such cases also generally rely on the Supreme Court's language in Stilson v. United States, 250 U.S. 583, where the requirement of treating several parties' defendant as a single party was upheld and the Court wrote: "It may be--that all defendants may not wish to exercise the right of peremptory challenge as to the same person or persons, and that some may wish to challenge those who are unobjectionable to others. But the situation arises from the exercise of a privilege granted by the legislative authority and does not invalidate the law. The privilege must be taken with the limitations placed upon the manner of its exercise," Id. at 586-87 [Emphasis added]. The general validity of this holding may be questioned today, given "The Demise of the Right/Privilege Distinction," Van Alstyne, 81 Harv.L.Rev. 1439 (1968). See, e.g. Goldberg v. Kelly 397 U.S. 254 (1970). It is inapplicable to the instant case because the legislature has now chosen to provide a judge with discretion on this matter; we argue simply that such discretion may not be abused.

The rule which requires regular or additional challenges to be exercised jointly unless the court specifies otherwise has been:

severely criticized since it deprives defendants who cannot agree on their challenges.

[8a Moore, *supra*, para. 24.04;
see N.Y.U. Institute, Federal
Rules of Criminal Procedure 175
(1946)]

While in the general case, a court has broad discretion, that discretion is not unbridled. Where, as here, a real showing of prejudice was made, where motions for severance and change of venue were repeatedly made and denied, and where the defendants (or at least one of them) were unquestionably "unpopular" in the community in which they were tried,⁹³ see United States v. Fujimoto, 107 F.Supp. 865, 867-68 (D.Hawaii, 1952) (Smith Act defendants given additional challenges to compensate for pre-trial publicity) it was error to force the defendants to exercise their challenges unanimously.⁹⁴

By permitting the defendants who were forced to trial with Dioguardi against their will to exercise their challenges separately, much of the prejudice which accrued might well have been avoided. As the Supreme Court wrote,

⁹³Moore suggests that the granting and exercise of additional peremptory challenges is particularly appropriate in this situation. Moore, *Id.*, p. 24-21 fn. 3. Notwithstanding Judge Knapp's remarks that Dioguardi would be equally notorious and presumably, unpopular everywhere else, his recognition of this fact required some corrective action.

⁹⁴Since the conflict was clearly between Dioguardi on the one side, and all other defendants on the other, the judge need only have divided the challenges two ways, thus causing a minimum of confusion or inconvenience.

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136.

[Swain v. Alabama, 380 U.S. 202, 219, reh. denied, 381 U.S. 921 (1965)]

B. The Trial

Whatever generalized prejudice existed against Aloï at the beginning of the trial focused as the government's case unfolded, and dramatically increased as the defendants Dioguardi and Lombardo took the stand.

The government's case, in which both Aloï and Savino played minor if not negligible roles⁹⁵ focused on the central figure Heller man and his alleged control, Dioguardi. Extensive evidence was introduced as to a continuing criminal agreement on stock frauds involving many more "deals" than AYSL; the purpose was allegedly to define the parameters of Heller man and Dioguardi's relationship.⁹⁶ Unmistakable references to organized crime were brought in again and again.⁹⁷ There was testimony of threats and pos-

⁹⁵ See Statement of Facts, supra, and , Point I, supra,

⁹⁶ It is separately contended that introduction of this evidence was improper, unwarranted and impermissible. As to this contention Aloï specifically incorporates the argument made in Appellant Dioguardi's brief at Point I.

⁹⁷ See the brief of Appellant Lombardo, Point IV, of which is expressly incorporated here pursuant to Rule 28(i) F.R.A.P.

sible violence which the jury could not help but impute to the "gangster"⁹⁸ Dioguardi. The "defenses" offered by Dioguardi and Lombardo⁹⁹ compounded prejudice and magnified the/by then clear sense that this was a Mafia trial. Repeated motions for severance and mistrial by Aloï were denied.

The judge permitted Dioguardi's extensive criminal record to be discussed at great length. Further, the prosecution was permitted to inquire as to his relationships with other notorious persons, e.g. James Hoffa, Sonny Franzese, etc., all reinforcing a general ambience of criminality and a particularized and unmistakable connection with organized crime.¹⁰⁰ Based on these considerations, additional motions for mistrial and/or severance were made. All were denied.

Finally, when Ralph Lombardo took the stand, the government was permitted to cross-examine him for an entire day on alleged loan-sharking transactions and other obviously Mafia-esque activities which had no connection with the conspiracy charged¹⁰¹ and which could only have been intended to pre-

⁹⁸Judge Knapp himself referred to Dioguardi in this fashion (T. 27).

⁹⁹Their decisions to take the stand and expose other crimes and/or criminal records underscores the dilemma of the defendant against whom little has been proved, and who chooses to rely on the presumption of innocence. The dilemma was compounded here by the burden which would have been placed on Aloï if he attempted to dissociate himself. See Point VI, infra.

¹⁰⁰The argument that this evidence was so highly prejudicial and inflammatory as to outweigh any probative value is set forth in Appellant Dioguardi's brief at Point I, and is here expressly incorporated by reference, Rule 28(i) F.R.A.P.

¹⁰¹The irrelevance, impropriety, prejudice and impermissibility of this evidence is fully argued in Appellant Lombardo's brief at Point IV. That argument is expressly incorporated.

judice him and his co-defendants. Again, Aloï moved for a mistrial or severance, again he was denied.¹⁰²

Whether or not a severance should have been granted at the beginning of the trial, based only on the prejudice from trial with Dioguardi exhibited up till then, it is clear that

. . . the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear.

[Schaffer v. United States, 362 U.S. 511, 516 (1960)]

Once proper joinder of counts has been found¹⁰³ severance is a discretionary remedy which may be employed

If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together.

[Fed. R. Crim. Proc., Rule 14]

The general rule, absent a showing of prejudice is, ". . . that persons jointly indicted should be tried together. . . ." United States v. Borelli, 435 F.2d 500, 502 (2d Cir., 1970), cert. denied, 401 U.S. 946 (1971). This is because the government should not ordinarily be put to two complete but separate trials of precisely the same issues, e.g., United States v. Stracuzza,

¹⁰²That this evidence was virtually the last heard by the jury could not but have had a devastating effect.

¹⁰³We do not here contend that the original joinder of course was incorrect, under Rule 8(b) Fed. R. Crim. Proc., but rather that the fashion in which defendants were split up was so prejudicial as to require a severance.

¹⁰⁴It must be noted that such would not have been the result in the instant case had Aloï's motion been granted. The government was already committed to try the four co-defendants separately after their motion for severance (on other grounds) was granted just prior to trial. Dioguardi could just as well have been tried with them as with Aloï and the other [cont'd next page]

270 F.Supp. 183, 188 (S.D.N.Y., 1970).

Where, however, substantial prejudice is alleged or shown, the balance must tip in favor of the rights of the defendants, e.g., United States v. Varelli, 407 F.2d 735, 744-48 (7th Cir., 1969), appl after remand, 452 F.2d 193, cert. denied, Saletko v. United States, 405 U.S. 1040 (1972); Gregory v. United States, 369 F.2d 185, 189 (D.C.Cir., 1966), appl after remand, 419 F.2d 1016, cert. denied, 396 U.S. 865 (1969).

In determining prejudice a court may consider the unsavory character of a co-defendant, see United States v. Myers, 406 F.2d 746, 747 (4th Cir., 1969), his prior criminal record, see United States v. Eaton, 485 F.2d 102, 107 (10th Cir., 1973),¹⁰⁵ unfavorable community sentiment, particularly when based on prejudicial publicity, Dennis v. United States, 302 F.2d 5 (10th Cir., 1962),¹⁰⁶ the fact that a jury might have found multiple conspiracies, thus

defendants. If it seems to this Court that to try the accountants with Dioguardi would unfairly tarnish them with the stigma of organized crime, cf. United States v. Greater Blouse, Skirt and Neckwear Contractor's Association, Inc., 177 F.Supp. 213 (S.D.N.Y., 1959), how much more serious is the prejudice likely to accrue to defendants, like Aloï, with Italian surnames.

¹⁰⁵Reference to a co-defendant's being "on parole" was recognized as a basis of a severance but was found insufficiently prejudicial in and of itself where it was brought out not by the prosecution but by the defendant's counsel in cross-examination. This is in line with the general rule that a co-defendant's criminal record, especially when asserted before trial is not per se enough to constitute prejudice under Rule 14, e.g., United States v. Johnson, 298 F.Supp. 58 (N.D.Ill., 1969). Here, of course, the prior record of Dioguardi and the criminal behavior of both Dioguardi and Lombardo constitute only a portion of the prejudice alleged.

¹⁰⁶In that Smith Act trial, the severance motion was ultimately denied because very few of the venire had ever heard of Travis, the defendant, from whom the others wished to be severed. The Court there suggested that a motion for change of venue would be the appropriate remedy to cure prejudice, but such a motion was not timely made.

leading to an impermissible spill-over effect under Kotteakos v. United States, 328 U.S. 750 (1956), e.g., United States v. Varelli, *supra*, a substantial difference in the amount of testimony adduced as to various defendants, United States v. Donaway, 447 F.2d 940 (9th Cir., 1971)¹⁰⁷ or that particular defendants

. . . are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants.

[United States v. Branker, 395 F.2d 881, 886 (2d Cir.), *cert. denied*, Lacy v. United States, 393 U.S. 1929 (1968)]

All of these factors were present in the instant case.

Dangers always inherent in joint trials are magnified where conspiracy, that darling of prosecutors, is charged. Accordingly, normal safeguards must be more stringently applied, see United States v. Borelli, 336 F.2d 376 (2d Cir., 1969), *cert. denied*, 376 U.S. 960 (1969); Matthews, SEC Prosecutions Under the Criminal Law, 39 Ge.Was.L.Rev., 901 (1971).

This is particularly true in complicated stock fraud cases, see United States v. Sanders, 266 F.Supp. 615, 621 (W.D.La., 1967). Accumulated evidence of co-defendants' wrongdoing requires severance of a late-comer to the conspiracy, where, as here,

¹⁰⁷ In that case, Donaway's conviction for interstate transmission of wagering information was set aside because of the enormous and disproportionate amount of testimony as to his co-defendants' handling and doping of horses. The court wrote, ". . . we find it impossible to conclude on the facts here that appellant was severely prejudiced by the evidence relevant only to the co-defendants" Id. at p. 943.

the proof supporting participation . . . in the single, overall conspiracy alleged in the indictment is tenuous and unsubstantial.

[United States v. Kelly, 349 F.2d 720, 756 (2d Cir., 1965), cert. denied, 384 U.S. 947 (1966)]

The combination of prejudice resulting from Dioguardi's general reputation, specific criminal record, Lombardo's alleged Mafio loan-sharking activities, and the complexity of illegal financial transactions of which Aloï knew nothing and in which he had no part, coupled with evidence of some long term stock swindle agreement between Dioguardi and Hellerman resulted in a situation where, as this Court has said,

The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, "the mounting proof of the guilt of one is likely to affect another.

[United States v. Branker, supra at p. 888]

The prejudice requirement of Rule 14 was met in excess; the court's refusal to grant a severance was reversible error.

C. The Charge

In considering the prejudice which may inevitably spill-over in complex conspiracy trials, the Supreme Court has listed three safeguards which must be accorded, i.e., clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions. The Court has emphasized that these are

extremely important . . . safeguards [which must] be made as impregnable as possible.

[United States v. Blumenthal, 332 U.S. 539, 559-60 (1947)]

These safeguards are crucial when there is a strong possibility of prejudice in a joint trial, and a severance is not granted. See United States v. Perez, 489 F.2d 51, 65-67 (5th Cir., 1973). In a close case, a court may find Rule 14 prejudice sufficiently diluted by a charge such as that given in e.g. Storn v. United States, 409 F.2d 819 (2d Cir., 1969),¹⁰⁸ or United States v. Baum, 482 F.2d 1325 (2d Cir., 1973).¹⁰⁹ See also United States v. Sanchez, supra.

While we argue that no charge could have effectively limited the prejudice discussed in sections (A) and (B) above, it is clear that the charge actually given in this case was totally inadequate to deal with any, let alone all, of the prejudicial testimony allowed into the trial.

On many occasions during the trial, when particular inflammatory material came in against one defendant (usually Dioguardi) the judge "reassured" counsel that he would "deal with it" in his charge.¹¹⁰ This was particularly

¹⁰⁸The court repeatedly instructed the jury to consider testimony as to a single defendant only as against him and carefully set forth each of the transactions only as it involved a particular defendant. Id. at p. 820.

¹⁰⁹There prior similar acts of a co-defendant Baum were introduced. Severance was not granted, but in submitting the case to the jury Judge MacMahon referred specifically to the testimony about prior similar acts and stated: "You may not and must not consider that testimony against any defendant other than Baum. In short, you cannot consider him in determining the guilt or innocence of [the other] defendants." Id. at p. 1332.

¹¹⁰Sometimes cautionary instructions were given to the jury, sometimes they were not. It is often difficult to tell from the record what was said to counsel and what to the jury. Cautionary instructions are, however, only one of the three safeguards required by Blumenthal, et al. No matter how good and detailed the instructions given during the trial, the charge must independently make it clear that certain evidence is limited to certain defendants since, at the end of a long trial: "It would have been difficult indeed for even the trial court to recall . . . the [numerous] occasions on which the statements were admitted and which statements were admissible against which defendants." Sims v. United States, 405 F.2d 1381, 1382 fn. 2 (D.C. Cir., 1968).

stressed by him in denying Aloï's motions for severance and/or mistrial after Dioguardi's record and associations came out, and after the government's inflammatory cross-examination of Lombardo.

The judge's sole charge on this issue was as follows:

Changing the subject, you will recollect that certain evidence was admitted only as against one or another of the defendants.

I call your attention to that circumstance every time it happened and you will recollect during summation, Mr. Goldberg called your attention to it in one respect.

I shall not refer to those various bits of evidence but simply remind you what I said about each of them at the time: evidence offered or admitted only one defendant should not be considered in connection with your determination of the guilt or innocence of any other defendant.

[A. 84-85]

This was totally "ineffectual" in protecting Aloï's right to have a trial free from prejudice, see United States v. Kelly, supra, at p. 758, and requires reversal of the conviction on all counts.

POINT V

THE JUDGE'S RULING THAT A PRIOR BUT NON-FINAL CONVICTION COULD BE USED TO IMPEACH ALOI UNCONSTITU- TIONALLY PREVENTED HIM FROM TAKING THE STAND IN HIS OWN BEHALF.

At the beginning of trial, in accordance with the procedure approved by this Court in United States v. Palumbo, 401 F.2d 270, 272-73 (2d Cir., 1968), cert. denied, 394 U.S. 947 (1969), Aloï's counsel informed Judge Knapp that Aloï had been convicted of perjury in the state court, and that conviction was presently on appeal. He requested a ruling as to whether the government would be permitted to bring out the perjury conviction if Aloï exercised his right to take the stand.

After some discussion (T. 14-20), the judge ruled that the government would be permitted to make such inquiry, but at the possible risk to them of a new trial if the perjury conviction were ultimately reversed (T. 132).¹¹¹ Based upon this ruling, Aloï chose not to take the stand.

(a) Non-final convictions should not be used for impeachment purposes

The issue of admissibility of non-final convictions is a murky one with seemingly infinite permutations and combinations.

¹¹¹A motion for a new trial based on Fed.R.Crim.Proc. 33 is, of course, discretionary and depends on some extent to the trial judge's determination of how "significantly" the claimed error may have affected the jury's determination. The existence of Rule 33 is, however, in no way a guarantee that such a new trial would be granted.

In the District of Columbia Circuit, a non-final conviction cannot be used for impeachment whatever the subsequent history of the conviction, e.g., Campbell v. United States, 176 F.2d 45, 47 (1949).

In the Seventh Circuit, a non-final conviction may be so used, also regardless of the subsequent history, e.g., United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.), cert. denied, 337 U.S. 959 (1949).¹¹²

In this Circuit, impeachment by a conviction on a guilty plea has been held reversible error where that plea might still be withdrawn. United States v. Semensohn, 421 F.2d 1206, 1208 (2d Cir., 1970); impeachment by a non-final conviction affirmed prior to this Court's consideration of the appeal was held not to require reversal, United States v. Owens, 271 F.2d 425 (2d Cir., 1959), cert. denied, 365 U.S. 874 (1961).

In its most recent decision in this area, United States v. Soles, 482 F.2d 105 (2d Cir.), cert. denied, ___ U.S. ___ (1973), this Court has apparently limited¹¹³ Semensohn's acceptance of the D.C. Circuit rule; Soles "adopt[s]"

¹¹²Cases in other circuits recently permitting impeachment by a non-final conviction have not indicated whether they are following the strict rule of the Seventh Circuit or whether subsequent reversal of the impeaching conviction would require a different result, e.g., United States v. Franicevich, 471 F.2d 427, 429 (5th Cir., 1973) (whose citation of United States v. Owens, *infra*, indicates that the latter might be true); United States v. Allen, 457 F.2d 1361, 1353 (9th Cir.), cert. denied, 409 U.S. 869 (1972) is similarly unenlightening stating, "until the judgment of the lower court is reversed, the conviction will stand and the defendant may be questioned regarding that conviction for purposes impeachment."

¹¹³The Court attempts to distinguish Semensohn first, because the conviction was for a misdemeanor and, second, because although it specifically quotes Campbell with approval, "the broader question was not before the court, and the government had not called the court's attention to the majority view." *Id.* at p. 107. The latter reason seems to require *en banc* determination rather than one panel overturning the decision of another. The former seems equally unpersuasive; if the question is strictly confined to the facts of the case, Soles also does not present the "broader question."

the view that the trial judge has the discretion to allow the use for impeachment of a conviction under appeal" Id. at p. 108.

The Soles case is clearly distinguishable on its facts. While the rationale of Semensohn and Campbell is far more apposite to the facts presented here.

In those cases the courts held that:

If the judgment of conviction is later reversed, the defendant has suffered, unjustly and irreparably, the prejudice, if any,¹¹⁴ caused by the disclosure of the former conviction.

[Campbell, supra, at p. 47, as cited
in Semensohn, supra, at p. 1208]

The Supreme Court has recently held that a defendant's testimony could not be impeached by convictions obtained without a lawyer prior to Gideon v. Wainwright, 372 U.S. 335 (1963); Loper v. Beto, 405 U.S. 473 (1972), because such convictions¹¹⁵ "lacked reliability," Id. at p. 484, and so could not be used "to support guilt," Id. at p. 482.

A conviction which has not been subjected to even the first stage of appellate review similarly lacks sufficient "reliability" to be used for purposes of impeachment.¹¹⁶

¹¹⁴This qualification, made in 1949, is dated in its equivocation. Subsequent jury studies indicate sure prejudice from a jury's almost certain inability to distinguish the "impeaching" function of the conviction from a general prejudice based on "bad character," e.g., 70 Yale L.J. 764, 767 (1961); 78 Harv. L. Rev. 426, 442 (1965). See also Borchard, Convicting the Innocent (1932), 121, 138, 162.

¹¹⁵which have presumably been subject to the scrutiny of appellate courts.

¹¹⁶The conviction in Soles had already been affirmed by Maryland's appellate courts; only the possibility of discretionary review remained, supra, at 107. The crucial fact, i.e., some independent determination of the conviction's reliability, was thus present in Soles, as it was not in either Semensohn or the instant case.

Using this analysis, the holdings in Soles, Semensohn, and Loper v. Beto may be easily reconciled. The relative reliability of a conviction which has been affirmed on direct appeal means that a trial judge must be permitted to use her or his discretion in determining whether to permit impeachment. In exercising such discretion, the bona fides of the issues raised on discretionary review may well be considered.¹¹⁷

But whatever discretion a trial judge may have as to impeachment by convictions still subject to discretionary review should not be permitted as to convictions where no appellate review has yet been had. The clear prejudice which inevitably results from the introduction of a prior non-final conviction, coupled with the compelling particular facts of the instant case¹¹⁸ compel the conclusion that Judge Knapp's ruling erroneously denied Aloï the right to take the stand requiring a reversal of the conviction.

(b) Judge Knapp's ruling also set up an impermissible discrimination in which the exercise of protected rights were unduly burdened.

If Aloï testified, the government could bring out the prior conviction. If that conviction were brought out, the likelihood of Aloï's conviction in the

¹¹⁷The Soles opinion specifically recommends this procedure. The court there set forth Soles' arguments in his certiorari petition, demonstrating their almost complete irrelevance to the conviction offered for impeachment. The apparent lack of good faith in Soles' arguments may well have influenced the court's expressed fears about "frivolous appeals and dilatory tactics" Id. Since direct appeals are taken as a matter of course, it is only the discretionary sort, as in Soles' own case, which present such a danger.

¹¹⁸First, the state courts have already made a preliminary finding of merit in Aloï's appeal by granting a certificate of reasonable doubt. NYCPL Section 510.30(2)(b) (A. 161, 171-72). Second, in the Imperiale stock fraud trial where the charges against Aloï were similarly peripheral,[cont'd next page]

instant case would be substantially increased.¹¹⁹ However, if the perjury conviction were subsequently reversed, Aloï's chance of a new trial was substantial. Cf. United States v. Owens, supra.

On the other hand, if Aloï exercised his right not to take the stand, he risked denial of a new trial motion based on such reversal.¹²⁰ This was an impermissible burden on his right to remain silent, cf. Chapman v. California, 386 U.S. 18 (1967).

Rulings such as this, which place a criminal defendant "between the rock and the whirlpool," Garrity v. New Jersey, 385 U.S. 493 (1967), also deny him due process of law, United States v. Jackson, 390 U.S. 570 (1968).

he took the stand in his own behalf and was acquitted, demonstrating that his testimony here may well have increased his chances for a similar verdict.

¹¹⁹See, e.g., 70 Yale L.J. 764, 777; Griswold, The Long View, 51 Amer.BarJ. 1017, 1021.

¹²⁰Judge Knapp's statement indicated he would grant such a motion only if Aloï testified (T. 132).

POINT VI

THE ADDITION OF SOME 20 ALLEGED "CO-CONSPIRATORS" ON THE EVE OF TRIAL PREJUDICED THE DEFENDANTS AND CONSTITUTED AN UNLAWFUL AMENDMENT OF THE INDICTMENT BY THE PROSECUTOR.

The defendants were originally indicted in May of 1973. At that time counsel for all defendants moved¹²¹ for a bill of particulars including the names of all other co-conspirators (JT 1622). No such bill was furnished. In July of 1973 the grand jury issued a superseding indictment in which several named but unindicted co-conspirators were named as defendants. No new named co-conspirators were added. Literally on the eve of trial, counsel for Dioguardi was served with an alleged bill of particulars dated September 28, 1973. An augmented list of co-conspirators including some twenty persons, was given to other counsel on October 30, 1973, the morning jury selection began (JT 22-23).

At that time all counsel strenuously objected to the apparently drastic expansion of the conspiracy evidenced by the new list of alleged co-conspirators.

Counsel argued that the list constituted an improper amendment of the indictment (JT 17-18, 26), and that there was no evidence that the grand jury had found that any or all of the people on the list were co-conspirators.

Since a grand jury had reconsidered the indictment after the bill of particulars as to "other persons known and unknown" was requested, counsel

¹²¹Pursuant to an informal letter procedure suggested by Judge Knapp (e.g., JT 24).

moved that at trial the prosecutor be confined to the co-conspirators named in the superseding indictment.¹²²

All "motions" and objections as to the list were noted and denied or overruled (JT 27).

It is well-settled that a defendant in a felony trial is entitled to be tried on an indictment returned by a grand jury, e.g., Ex Parte Bain, 121 U.S. 1 (1887), and that

. . . an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form.

[Russell v. United States, 369 U.S. 749]

While a court, e.g., Salinger v. United States, 272 U.S. 542 (1926) or prosecutor, Williams v. United States, 238 F.2d 215 (5th Cir., 1956) may narrow an indictment by striking counts or portions of counts prior to submission to the jury, this is because the result is

. . . to narrow, not to widen the issues [is] called to meet.

[Thomas v. United States, 398 F.2d 531, 539 (5th Cir., 1967)]

To widen, as here, the indictment, is unlawful because:

The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group

¹²²As Mr. Newman argued: "Here we have a whole month gone by and here is a whole list amplifying what was already in the superseding indictment. We couple that with the fact that in this superseding indictment they took co-conspirators from the first, they named them as defendants and amplified co-conspirators, and by then I am certain, with all the preparation they did, all these people were formed in their minds, and we should at least have been entitled to know these people much before this morning." (JT 22)

of his fellow citizens acting independently
of either prosecuting attorney or judge.

[Stirone v. United States, 361
U.S. 212, 218 (1960)]

The error here--that of drastically expanding the number of co-conspirators whose statements or bad acts could be imputed to the defendants¹²³--is similar to that described by Judge Frankel in United States v. Agone, 302 F.Supp. 1258 (S.D.N.Y., 1969). In that case the alleged victim of the crime charged might have been any one of a number of persons.¹²⁴ As Judge Frankel wrote, the omission from the indictment indicates

a failure by the grand jury to complete and record with certainty the task it (exclusively) has under the Fifth Amendment. The grand jury has neither said nor explained its failure to say who among a substantial number of possibilities is supposed to have been the target of the alleged crime. It has left the prosecution free to fill in this vital missing element - free, in a way which is constitutionally grave whether or not it is highly improbable, to name someone different from the one intended by the grand jury. A prosecutorial power to "roam at large," in this fashion is not allowable. Russell v. United States, supra, 369 U.S. at 768-771, 82 S.Ct. 1038.

[United States v. Agone, Id. at p. 1261]

¹²³That prejudice in fact resulted from this amendment cannot be ignored. See particularly hearsay testimony as to a conversation by Steven Shustek, one of the new "co-conspirators" about the partnership between Dioguardi and Hellerman (T. 2811). Strenuous objections were made, see T. 2792-94, 2789-90, and overruled (Id.). As to general prejudice from statements of improperly or tenuously joined co-conspirators, see United States v. Wolfson, supra, 437 F.2d at 870.

¹²⁴In that case as well, a bill of particulars was the vehicle by which the government's "amendment" was to occur.

The scope of a conspiracy and the participants in it¹²⁵ are sufficiently important that they too must be specifically set out by the grand jury lest a defendant be convicted of a scheme broader and more widely peopled than any considered and believed by the grand jury. See United States v. Caine, 441 F.2d 454, 456 (2d Cir., 1971), cert. denied, 404 U.S. 827 (1971), citing United States v. Pope, 189 F.Supp. 12, 25-26 (S.D.N.Y., 1960).¹²⁶

The prosecutorial "amendment" in the instant case, resulting in actual prejudice, was similarly improper; the judge's denial of counsel's limiting motions was error.

¹²⁵In complex securities cases it has been noted, ". . . prosecutors often find the concept of a 'named but unindicted co-conspirator' useful for publicly identifying fringe participants on the overall scheme and preserving proof of their conspiratorial declarations as to evidence against indicted defendants." (Matthews, supra. at p. 924). Given the importance of unindicted co-conspirators in proving the prosecution's case, the equal importance of full disclosure, necessary for preparation of the defense case, cannot be ignored.

¹²⁶"The second basis of the holding in Pope was to assure that a defendant is not convicted of charges either rejected or not considered by the grand jury." (Id.; emphasis added). Significantly, Pope was a securities case charging the making of false statements.

POINT VII

THE FAILURE TO PERMIT A VOIR DIRE ON CROSS-EXAMINATION ON GRAIFER'S UNDERSTANDING OF HIS OATH REQUIRES REVERSAL.

The crucial testimony¹²⁷ of Edmond Graifer was given "under oath." On cross-examination, Aloï's counsel attempted to elicit Graifer's understanding of the meaning of an oath. In the brief questioning which the court permitted, Graifer stated only that it meant that "you are supposed to tell the truth . . ." and that if you do not do so "you can be penalized [by] contempt of court, perjury. . . ." He did not know that the oath had another meaning (T. 669). When Lewis attempted to question about the religious meaning of the oath the judge cut him off, over objection (T. 669-70). This was error.

An oath, as opposed to an affirmation, implies that the witness testifies truthfully for religious purposes as well as to avoid legal penalties connected with untrue statements. See United States v. Miller, 236 Fed. 798, 799 (W.D. Wash., 1916). Cf. NYCPL Section 2309(b). This Court, citing Wigmore, recognized that the oath is a "prophylactic rule" which is distinct from but coupled with the penalties for perjury and which serves to influence

the witness subjectively against conscious falsification, the one by reminding him of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power.

[United States v. DeSisto, 329 F.2d 929, 934
(2d Cir., 1964), cert. denied, 377 U.S. 949 (1964)]

¹²⁷It is fairly clear that there could have been no convictions without his testimony. This was particularly true as to Aloï, and certainly true as to his conviction on count 10. See Point III, supra.

The oath's purpose is to impress the witness with the gravity of the responsibilities assumed. Id. See United States v. Looper, 419 F.2d 1405, 1407 (4th Cir., 1969); Proposed Federal Rules of Evidence, Rule 603; NYCPLR, Section 2309(b).

If Graifer did not truly understand the meaning of the oath he had taken, his competence as a witness was placed in severe doubt¹²⁸ and a thorough voir dire should have been held.¹²⁹

Even if his misunderstanding or misstatement of the oath did not render him incompetent, it raised issues as to his general credibility which the jury was entitled to consider, cf. Application of Griffiths, 93 S.Ct. 2851 (1973); Bond v. Floyd, 385 U.S. 116, 132 (1966), and counsel to explore.¹³⁰ Where cross-examination of a government witness is "the principle recourse of the defense," e.g., United States v. Persico, 305 F.2d 534, 537-38 (2d Cir., 1962), the defense should be given broad latitude in pointing out the

¹²⁸As this Court wrote in United States v. Fiore, 443 F.2d 112, 115 (2d Cir., 1971), cert. denied, 410 U.S. 984 (1973): "Although FRCr.P 26 does not expressly require an oath, it refers the admissibility of evidence and the competency of witnesses to 'the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience! There is no room for doubt what those principles require in this context. Wigmore instructs that 'for all testimonial statements made in court the oath is a requisite.'" Id. at p. 115.

¹²⁹See Proposed Federal Rules of Evidence, 1-04(a).

¹³⁰In United States v. Montello, Docket No. 73/2556, 73/2616, aff'd without opinion (2d Cir., 1/30/74) application for certiorari pending, Mr. Lewis raised a similar point about the oath with regard to a witness' competency. In that case, however, he was permitted to cross-examine on the issue at length, Montello, supra, Appendix at pp. 47a-49a, 100a-101a. As Judge Mulligan noted at oral argument, Lewis was able to develop the issue fully in summation. He should have been given the same opportunity in the instant case.

falsity or lack of credibility to be accorded the witness' testimony,¹³¹ see Point II of Lombardo's brief, adopted supra.

Accordingly, the court's limitation of counsel's questioning constituted reversible error.¹³²

¹³¹ It is significant that Mr. Schreiber chose to conclude his summation by stressing to the jury the seriousness of the oath they took, "just like [a government witness] took an oath" (T. 5448-49). Obviously the government considered the importance of the oath, as vouching for honesty, as important as did Mr. Lewis.

¹³² At the end of the government's case, Mr. Lewis moved to strike the "unsworn testimony of Graifer and for acquittal" (T. 3226-29). It is also contended that the denial of this motion was error.

POINT VIII

THE SENTENCE IMPOSED WAS BASED
UPON MISAPPREHENSIONS OF LAW AND
FACT AND WAS DETERMINED IN A
PROCEEDING WHICH DEPRIVED ALOI
OF THE MINIMUM REQUIREMENTS OF
DUE PROCESS OF LAW

The jury found Aloï guilty of one count of conspiracy, one count of issuing a false financial statement, and one count of wire fraud.

Judge Knapp, in an unusual procedure, requested the United States Attorney's Office to make specific recommendations on sentencing. This was done through a memorandum of law¹³³ which provided purported "factual" summaries of the "criminal" activities of all four defendants, and recommendations that, inter alia, Messers Aloï and Dioguardi receive maximum terms on each count.

Judge Knapp also received and relied upon a presentence report which was turned over to counsel for the various defendants.¹³⁴

On the date of sentencing the Assistant United States Attorney argued

¹³³This memorandum is part of the Supplemental Record on Appeal.

¹³⁴At the outset we should note that we are not here involved with the controversy over disclosure of presentence reports which has plagued this and other courts in the past. See, e.g., United States v. Fischer, 381 F.2d 509 (2d Cir., 1967), cert. denied, 390 U.S. 973 (1968); Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969) (hereinafter "Lehrich"); 8a Moore, Federal Practice, 32.03(4) (Cipes ed., 1973) and which has finally been settled by the introduction of new Rule 32 of the Federal Rules of Criminal Procedure (effective July 1, 1974).

at length¹³⁵ that Aloï was

A person who is a very powerful person in organized crime. . . . [who] since 1952 . . . has engaged in increasingly serious violations of law and, at the same time . . . has been carving out a niche for himself in the world of organized crime.

[A. 137, 134]

According to Schreiber, Aloï

. . . seeks to maintain an illusion to the world and perhaps to this Court that he is basically a legitimate businessman who had really no connection with this crime whatsoever. . . . [and that he] has been put on payrolls of companies to create the appearance of legitimacy where in fact there is none.

[137, 138]

In fact, however (according to Schreiber), "he is reputed to be reliably the head of the organized crime family in New York" (A. 134). Schreiber then detailed an alleged death threat made by Aloï to Hellerman which was based on unsworn, unchallenged statements made by Hellerman (A. 139).¹³⁶

He further argued that Aloï was responsible for the death of Joey Gallo; that

he first sought unsuccessfully to line Joey Gallo to a sit-down on the pretense of resolving

¹³⁵In order to appreciate the full impact of the prosecutor's remarks and the judge's statements, a full reading of the sentencing minutes (A. 132-73) is necessary. What follows is merely typical.

¹³⁶It would be futile at this point to restate all of the reasons why Hellerman's "remarks" are entitled to no credibility whatsoever. See Point IV of Appellant Dioguardi's Brief, incorporated here pursuant to Rule 28(i) F.R.A.P.

problems that had developed in his particular
organized crime family.¹³⁷

[A. 139]

Finally, when this attempt to kill Gallo failed,

Vincent Aloï authorized an open contract to
murder Joey Gallo and the murder was actually
carried out by his associates.¹³⁸

[A. 139-40]

Defense counsel attempted to answer these statements, but virtually
every argument made was answered, in an adversarial fashion, by the judge
himself.¹³⁹ As Mr. Lewis so aptly put it:

. . . these are things that are coming up now
in an effort to tar and feather this man and that
sounds like a re-enactment of The Godfather in
this courtroom. There is a scenario that has been
drawn up by the United States Government.

[A. 146]

In referring to the presentence report, Mr. Lewis pointed out that it
was based on allegations obtained entirely through double and triple hearsay;
by statements allegedly made by the F.B.I. based on information from other
sources. He specifically requested an opportunity to rebut the information
contained in the report, and stated,

That is what I ask in this particular case.
Let the government produce evidence, proof

¹³⁷ Aloï's alleged membership in the so-called Columbo family was a
favorite topic of Mr. Schreiber's during the trial as well, and he made numerous
attempts to interject it into the jury's determinations. Failing in this, he re-
doubled his attack on the judge, who was apparently more susceptible.

¹³⁸ Far more offensive and lurid discussion of this and other criminal
incidents (loansharking, etc.) appear in the Government's Memorandum on
"Recommendations."

¹³⁹ See A. 142-45.

before your Honor that these accusations of lawlessness, of criminal activity, of killings, of ordering people to do things, be proved to your Honor's satisfaction--to denigrate an individual by character assassination, by hearsay upon hearsay, I say is manifestly unfair.

[A. 147-48]

After substantial further discussion, Judge Knapp made, inter alia, the following observations:¹⁴⁰

This case in a sense poses a dilemma. These are various facts about other things except what is involved in this case, the probation report and the sentence, in that the writer, the probation officer said it was beyond his power to separate fact from fiction and I am afraid it is beyond my power too.

[A. 153-54]

Judge Knapp assumed that:

[Aloi]--certainly--knew something about the Gallo killing and he did not wish it disclosed.¹⁴¹

He said that the government

. . . could have put in testimony [about conversations between and Buster Aloi] from which threats could be readily adduced.¹⁴²

[A. 155]

¹⁴⁰His entire "statement" is reprinted at A. 153-57.

¹⁴¹At this point in his remarks, he said he couldn't rely on the "implications of the state conviction and in imposing sentence, because if "the conviction is reversed, the impropriety of my so relying would be obvious" (A. 154). Only minutes later, however, in discussing bail, he made it clear that he accepted it and its "implications" stating: "I can see no logic in [Aloi] having lied about it unless he was in some way involved in that killing" (A. 169). See also A. 170 and A. 171 for similar statements.

¹⁴²This statement is indicative of the confusion repeatedly engendered by statements, acts, etc., attributed to Buster rather than Vincent, and which literally and tragically demonstrate an instance of a son punished for the sins of his father.

He stated that the conviction

. . . makes no sense unless this defendant exercised considerable power over these people and exercised it for criminal purposes.

[A. 156]

and, finally,

. . . that Mr. Aloï and Mr. Dioguardi are equally of importance in the case that was tried before me with the modification that Mr. Aloï did not commit perjury¹⁴³ and I think the appropriate sentence would be the same sentence that I administered to Mr. Dioguardi ex [sic] the extra imposed for perjury.

[A. 157]

Whereupon Judge Knapp sentenced Aloï to five years on the conspiracy count and four years on the false financial statement, those sentences to run consecutive to each other and consecutive to the prior State sentence (A. 157). A five year sentence on the wire fraud conviction was suspended, and the maximum fines permissible were imposed on each of the three counts (A. 159).

Aloï strongly contends that the sentence was illegal and unconstitutionally obtained in that:

(a) the sentence imposed was entirely inconsistent with the judge's remarks;

(b) the judge's reasons for imposing such an extreme sentence were improper and incorrect;

(c) the presentence report considered enormous amounts of entirely improper and incorrect information which should not have been considered by the judge;

¹⁴³As is more fully contended in Appellant Dioguardi's brief, reliance on alleged perjury in increasing sentence is entirely improper, e.g., United States v. Scott, 419 F.2d 264 (D.C.Cir., 1969). We mention it here only as one more instance of the many improper considerations which were permitted to influence sentencing in this case.

(d) the prosecutor's memorandum of recommendations should not have been requested or considered, and was improper, inflammatory and inaccurate; and

(e) the defendant was denied any effective means of rebutting the above.

Although they are interrelated, and necessarily overlap, we will attempt to deal with these contentions seriatim.

(a) Judge's Error of Fact

Judge Knapp found that Aloï was equally responsible for this stock fraud with Dioguardi¹⁴⁴ and announced that he was giving them equal sentences, with the exception of an additional year for Dioguardi's alleged perjury. While this was his clearly stated intention, the sentences imposed did not achieve that result.

Dioguardi was already serving a sentence of nine years on his conviction in the so-called "Belmont" case, 71 Cr. 558, and his two consecutive five year sentences (on counts 1 and 18) were imposed concurrent to that sentence. Assuming no reversal on either conviction, Judge Knapp effectively imposed a one year sentence on Dioguardi.¹⁴⁵

¹⁴⁴We believe this statement is totally unsupported by the record. See the Statement of Facts in Appellant Dioguardi's brief, incorporated herein. The key to and mastermind of the fraud was Hellerman and he was acting, according to the government's view, as Dioguardi's man. Ralph Lombardo, whose participation was peripheral in comparison to Hellerman's was Buster Aloï's "man," not Vincent's. In addition, Graifer's frequent trips to Florida--rather than to Suffern, New York--conclusively demonstrate that it was Buster, not Vincent who had the power to put together or halt the alleged deal. By the government's own case, Vincent was little more than an on-the-spot "go-fer" who was, for geographical reasons, able to carry out his father's instructions. None of these facts are, of course, conceded.

¹⁴⁵In fact, the effect is even less, since on sentences of 10 years or over, a prisoner is eligible for 2 more "good time" days per month than a prisoner sentenced to anything less than 10 years. Assuming Mr. Dioguardi earns all his good time days, i.e., about 220, he will actually serve only 145 days on this conviction.

Aloi's sentence of nine years was, however, specifically ordered to run consecutively to his state sentence of seven years. Accordingly, Mr. Aloi faces a total of sixteen years while Mr. Dioguardi faces a total of ten, but Mr. Aloi's maximum federal sentence on this crime will be some eight and two thirds years more than his "equally responsible co-defendant"!

(b) The Judge's Reasons

First, and crucial, is the judge's departure from the general run of sentences which are imposed in stock fraud cases like this one.¹⁴⁶ There can be no question that nine years is an extremely harsh penalty for the crime¹⁴⁷ of which Aloi was convicted.

Added to this is the extraordinarily harsh and equally unusual fact of sentences both consecutive to each other and to the state sentence previously imposed. See Moore, supra, 32.04(6) at pp. 32-73.¹⁴⁸

¹⁴⁶ This court has often decried the "sorry parade of such cases which it is called upon to review, and the sentences normally imposed cannot have escaped this Court's notice. See, e.g., United States v. Kelly, 349 F.2d 720 (2d Cir., 1965).

¹⁴⁷ A study recently completed by the United States Attorney's Office for the Southern District of New York indicates that "only 66% of those convicted for securities fraud--received prison sentences (with an average term of one year and seven months for those without prior criminal records)," and that the likelihood of imprisonment on a securities fraud conviction in all federal courts was an astounding 21.5%. Whitney North Seymour, Jr., 1972 Sentencing Study for the Southern District of New York, N.Y.S. Bar Journal, 163, 164, 165 (April, 1973).

¹⁴⁸ Usually, the courts will impose concurrent sentences, particularly where the multiple counts are based on a single criminal act or transaction. Id. The rare instances in which this does not occur are those "where a court in effect throws the book at the offender. . . ." Remarks of Professor Herbert Wechsler, Second Circuit Judicial Conference on Appellate Review of Sentence, 32 F.R.D. 249, 289 (1962) (hereinafter "Circuit Conference").

Based on a reading of all the judge's remarks at sentencing, the only possible rationale for this extraordinary sentence was his belief that Aloï was a high figure in organized crime, responsible in some way for the Gallo murder, and in some respect the "mastermind"¹⁴⁹ and moving force of the conspiracy tried before him.

The first two assumptions are entirely unsupported by any competent evidence of any kind¹⁵⁰ and cannot and should not be permitted to influence the sentencing of a defendant convicted of a particular, and, it must be noted, non-violent, crime. The latter assumption is entirely unsupported by the record (See, Point I, supra, fn.144, supra).

Treating offenders as members of a class in sentencing is impermissible whether the class is defined by the offense committed, see United States v. Baker, 487 F.2d 360 (2d Cir., 1973); Woosley v. United States, 478 F.2d 139, 143-45 (8th Cir., 1973) (en banc), or by membership in a race or group. The latter, which occurred in the instant case, is no more than guilt by association.

As Judge Herlands has forcefully stated, with regard to another reputed "Mafia" leader:

¹⁴⁹Other unquestioned "masterminds" in similar cases have received far shorter terms while inflicting far greater damage on the investing public, e.g., United States v. Hayutin, 398 F.2d 944 (2d Cir., 1968), cert. denied, 393 U.S. 961 (1969) (2-1/2 years concurrent on each of 14 counts); United States v. Doyle, 348 F.2d 715 (2d Cir., 1965) (3 years, with execution suspended after 3 months).

¹⁵⁰We here accept, for the sake of argument, the fact that certain kinds of hearsay evidence are admissible in sentencing determinations, but do not concede that such hearsay should be entirely unbridled. See United States v. Weston, infra.

A sentence must be "based upon constitutionally permissible factors and, if based "upon clearly erroneous criteria," it may be vacated. *United States v. Mitchell*, 392 F.2d 214 (2d Cir. 1968). Cf. Majority and dissenting opinions in *Verdugo v. United States*, 402 F.2d 599 (9th Cir., 1968).

An alleged association with suspected or notorious criminals or a reputation for such association is not the equivalent of an "arrest." Even an "arrest" cannot validly be treated as a "conviction" for sentencing purposes. To do so would contravene due process of law. *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). See Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv.L.Rev. 821 (1968).

A defendant's associates and his reputation are, of course, relevant biographical circumstances to be considered by the Court, along with other pertinent data, in evaluating the defendant's background, personality and characteristics and in forming a comprehensive judgment. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)

But even in *Williams* Mr. Justice Black, writing for the majority, noted that the sentencing procedure is not immune "from scrutiny under the due process clause." (337 U.S. at 252, n. 18, 69 S.Ct. at 1084).

Consequently, the defendant's alleged underworld associates and his alleged status in the Mafia or Cosa Nostra cannot and do not constitute a predicate or criterion for punishment.

[*United States v. Rao*, 296 F.Supp. 1145, 1148-49 (S.D.N.Y., 1969)]¹⁵¹

¹⁵¹Significantly, in that case, much of the information about Rao's alleged underworld activities grew out of his participation in the so-called Appalachia meeting. Rao was convicted of perjury with regard to some questions about alleged narcotics involvement but the count dealing with Appalachia was severed and he was never tried on it. The analogy to Alois, who allegedly lied about his presence in an apartment, but who was never indicted or tried for the Gallo killing--or perjury about it--is clear.

The purpose of criminal conspiracy statutes, invoked in this case, is to punish unlawful association for particular acts. General association may not constitutionally be punished either directly, e.g., Scales v. United States, 367 U.S. 203 (1961); United States v. Spock, 416 F.2d 165, 171-74 (1st Cir., 1969); or indirectly, United States v. Rao, supra, and should, in any case, not even be alleged when based upon conjecture and projection which cannot "separate fact from fiction." Cf. Masiello v. Norton, 14 Crim.L.Rptr. 2107-08 (D.Conn, October 12, 1973).¹⁵²

The evidence of other crimes, particularly the Gallo murder should not, as contended more extensively infra at (c) affect a sentence determination. The Supreme Court has recently held that sentence may not discretionarily be increased by virtue of prior convictions obtained without counsel. United States v. Tucker, 404 U.S. 443 (1972). The rationale of such exclusion from the judge's determination is that

¹⁵² In that case, another alleged "Mafia son" was punished for the sins of his father, the well-known "Gentleman John." In attacking the Parole Board's refusal of parole he alleged denial of due process because he had been summarily designated o/c (organized crime) thus necessitating a different from of parole review (as well as other internal prison restrictions) than other prisoners. Judge Zampano agreed that such a determination was permissible if based on "a reasonable basis in fact" but found such basis lacking where the designation was given "solely on the basis of the allegations contained in his presentence report." Like the report in the instant case, it "contains the usual factual background which is of aid to a sentencing court, but, in addition, it is replete with hearsay, inferences and conclusions concerning alleged connections between the Masiello family and organized crime. . . . The presentence report 'discloses no identifiable sources for the many adverse accusations, nor does it even classify them as 'reliable.' . . . [The Board] . . . apparently accepted at face value some loosely-worded, unsupported assertions and, in haste, determined that Masiello was a key figure in organized criminal activities" Id. at p. 2108. Accordingly, a new hearing, in which Masiello could contest these allegations, was ordered.

[to] permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense--is to erode the principle of that case.

[Id. at p. 449, quoting from Burgett v. Texas, 389 U.S. 109, 115 (1967)]

This statement in turn requires examination of the "principle" or rationale of Gideon¹⁵³ itself, which is no less than the unreliability¹⁵⁴ of a conviction obtained without the presence of counsel who can insure that a fair trial is had. See Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

If the "principle" of Gideon is offended by sentencing reliance on crimes determined after conviction but without counsel, how much worse is reliance on crimes where not only was there no counsel, but no conviction as well!

(c) The contents of the presentence report

As we have argued above, the judge could not constitutionally consider other "crimes" allegedly committed by Alois when those "crimes" did not result in arrest, indictment or conviction. The presentence report (and the prosecutor's recommendations, see infra) was, however, composed almost entirely of allegations of such crimes and of generalized "criminal" behavior which as the judge himself later stated "could not separate fact from fiction." This was entirely

¹⁵⁴Justice Stewart, writing for the majority in Tucker did just that. See Tucker, supra, pp. 447-48 fn. 5.

¹⁵⁵The issue of "unreliability," going to the "integrity of the fact finding process," is stressed again and again in the retroactivity cases, e.g., Linkletter v. Walker, 381 U.S. 618 (1965); that lack of "reliability" is precisely the reason why Gideon itself was applied retroactively.

improper.¹⁵⁶

The issue of sentencing reliance even on provable criminal acts is wide open, e.g., Lehrich, supra, at p. 236. Many courts refuse to allow consideration of any prior criminal acts unless there is proof of an actual, constitutionally valid conviction.¹⁵⁷ The Fourth Circuit, in laying down minimal standards for presentence reports, has stated

No convictions or criminal charges should be included in the report or considered by the court unless referable to an official record.

[Baker v. United States, 388 F.2d 931, 933-34 (4th Cir., 1968)]

This is also the view of the American Bar Association, which specifically found that all arrests and other dispositions short of judgment should be excluded from presentence reports. ABA, Project on Standards for Criminal Justice, Probation, p. 37 (Approved Draft, 1970).

¹⁵⁶ As Judge Frankel has written, discussing the uncontrolled information in the presentence report: "What ought to be perfectly clear . . . is the intolerable risk of error when we rely for grave decisions of law on untested hearsay and rumor. Our trial procedures eschewing such reliance presumably rest upon the solid experience of centuries. . . . We should have learned from repeated examples the dangers of secret 'facts' from unnamed informers. But we continue to operate in our sentencing practice as if we had no such knowledge." Frankel, Criminal Sentences, Law Without Order, p. 32 (1973).

¹⁵⁷ For example, the Third Circuit has required that all prior convictions listed in the presentence report must be turned over to the defendant, regardless of a judge's other policies on non-disclosure, so that counsel may rebut any inaccuracies. The court found that because only convictions were involved, the presentence report was likely to be accurate, "But it may also contain information which is inaccurate since the report may not list convictions which were later reversed or modified. Moreover, it may even list 'convictions' which are unrelated to the defendant or mistakenly attributed to him." United States v. Janiec, 464 F.2d 126, 129 (3d Cir., 1972). Obviously "crimes" unrelated are even less acceptable.

If prior crimes which have resulted in something short of constitutionally supported¹⁵⁸ conviction, may not be included in a presentence report, surely the unsupported allegations of various uncharged criminal acts¹⁵⁹ contained in the instant report were doubly impermissible.

For the reasons set forth above, see especially Masiello v. Norton, supra, the presentence report's unsupported characterization of Alois as a leading figure in organized crime was equally unlawful. The quantum of evidence which must, consistent with notions of fairness and due process, be alleged before such allegations can be made is surely greater than the innuendos which occurred here. United States v. Weston, 448 F.2d 626 (9th Cir., 1971), cert. denied, 404 U.S. 1061 (1972).¹⁶⁰ Masiello, supra.

¹⁵⁸See Tucker v. United States, supra.

¹⁵⁹We do not believe that any of our discussion as it pertains to the instant case, is in conflict with any rule in this Circuit. The leading case, United States v. Doyle, 348 F.2d 715, 721 (2d Cir., 1965), has sometimes been baldly cited for the proposition that "evidence of other crimes for which the defendant was not convicted is admissible," e.g., United States v. Cifarelli, 401 F.2d 512, 515 (2d Cir.) (per curiam), cert. denied, 393 U.S. 987 (1968). An examination of the facts of that case demonstrates, however, that it supports no such generalized statement. In Doyle, the "prior criminal acts" were actually charged in the indictment to which Doyle ultimately pled. Because his plea was only to one count, he argued that evidence as to the circumstances of the other counts was inadmissible. This Court rejected his argument as "ludicrous" stating that Doyle, "by adhering to his [plea of not guilty] could have had a public trial where he could dispute all the Government's charges. . . ." Doyle, supra, at p. 721. No such "trial" was available--or justified--as to such crimes as the Gallo murder.

¹⁶⁰In that case, Weston was characterized by the presentence report as a major narcotics dealer. This conclusion, which clearly resulted in increased punishment, was based only on "the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs and the unsworn statement of one agent that an informer had given him . . . information lending . . . support to the charge." Id. at p. 633. The Court found that it would have been virtually impossible to "prov[e] the negative" of this charge and a "great miscarriage of justice to expect Weston . . . to assume the burden and expense of proving . . . she is not the large scale dealer that the anonymous [cont'd next page]

One commentator, discussing the area generally, and Weston specifically, has made an interesting and useful analysis. He reads Weston as finding a reversible "abuse of discretion" unless the information used in a presentence report is "persuasive of the validity of the charges there made" Id. at p. 634. Because the Court pointedly compares this with the information required for a valid search or arrest warrant, he believes that it is implicitly applying a test of probable cause to the presentence report--and approves this as a general formula consistent with a sentencing court's need for information and the defendant's need for fairness or due process.¹⁶¹ Note, Criminal Procedure: Probable Cause and Due Process at Sentencing, 50 N.Car.L.Rev. 925 (1972).

We would argue that no evidence of prior crimes which have not resulted in conviction should be permitted. Even under the lesser probable cause test, however, the information contained in the instant presentence report was entirely improper, because "a rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." Weston, supra, at p. 638.

informant says that she is" Id. at 634. The Court vacated the sentence saying that Townsend v. Burke is extended "but little in holding that a sentence cannot be predicated on information of so little value. . ." Id. at 638.

¹⁶¹"Certain similarities between an affidavit for issuance of a warrant and a presentence report easily lead to such an analysis. Both frequently are based on information from informers or other unsworn statements. Both can be based on evidence not legally competent in a criminal trial. Hearsay can be the basis for the issuance of a warrant just as it can be the basis for a trial judge's determination of sentence." Id. at pp. 933-34. The application of the probable cause standard will also, it is argued, provide appellate courts with reasonable and familiar standards for review.

(d) The Prosecutor's Recommendations

Everything which may or has been said about the Presentence Report can be repeated about the "report" submitted by the prosecutor, a "report" which reads more like a script for "Mission Impossible" than a legal document upon which a defendant's future ought to depend.

Such a document itself is highly suspect. See Haller v. Robbins, 409 F.2d 857 (1st Cir., 1969)¹⁶² and under no circumstances may it be employed to influence a judge without disclosure and an opportunity to rebut,¹⁶³ see United States v. Allsenberrie, 424 F.2d 1209 (7th Cir., 1970).

The better rule seems to require exclusion altogether, especially when a presentence report is available.

Where the court has an objective (or relatively objective) source of background information, there can be little justification for relying upon an obviously subjective or partisan force.¹⁶⁴

[8a Moore, Federal Practice, 32.94(3)
(Cipes ed., 1973)]

¹⁶²As that court pointed out, "However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case...." Id. at p. 859.

¹⁶³In Haller, supra, although the prosecutor's ex parte report might later be made part of his statement in open court, the First Circuit found "At a minimum, to permit only tardy rebuttal of a prosecutor's statement . . . is a substantial impairment of the right to the effective assistance of counsel to challenge the state's presentation." Cf. Mempa v. Rhay, 389 U.S. 128 (1967).

¹⁶⁴This is especially true after a hotly contested trial because, according to Moore, "Prosecutors do not gain their reputations from cases in which defendants plead guilty. . . . in the contested case . . . often the 'big' case . . . the prosecutor's success seems to be measured not simply by the conviction obtained but by the severity of the penalty imposed after conviction." Id.

And see ABA, Project on Minimum Standards of Justice, Sentencing, Section 5.3(6) (Approved Draft, 1968).

The report in the instant case graphically illustrates the dangers of an overly partisan (and factually unsubstantiated) presentation. We can only speculate how much it influenced the sentencing judge, but it was inherently so prejudicial¹⁶⁵ that its admission should be deemed a violation of fundamental fairness.

(e) The Right to Effective Rebuttal

Many courts have permitted the use of otherwise questionable information at sentencing only because the defendant was given an opportunity to deny or rebut that information and did not do so, e.g., United States v. Cross, 354 F.2d 512, 514 (D.C.Cir., 1965), United States v. Strauss, 443 F.2d 986 (1st Cir.), cert. denied, 404 U.S. 851 (1971).¹⁶⁶ Cf. Williams v. New York, 337 U.S. 250 (1949).

This is true because reliance on inaccurate information at sentencing may rise to the level of a constitutional violation under Townsend v. Burke, 334 U.S. 736 (1948), e.g., United States v. Malcolm, supra, at p. 819, where it appears that inaccurate information has been used by a sentencing judge appellate courts

¹⁶⁵As well as cumulative of all the hearsay, prior crime errors in the presentence report.

¹⁶⁶In Strauss, the trial judge was permitted to consider information that the defendants were members of a criminal syndicate, but this information was based on sworn testimony before two Senate committees (thus distinguishing it from Rao and Masiello, supra) and, of equal significance, both counsel and defendants were afforded an opportunity to rebut. Strauss, Id., at pp. 990-91.

will remand to give the defendant an opportunity to rebut.¹⁶⁷ United States v. Espinosa, 481 F.2d 553 (5th Cir., 1973), United States v. Malcolm, *supra*. Likewise, in the sentencing procedure itself the court should advise the defendant of the facts considered against him and accord him a "fair opportunity to controvert them." ALI, Model Penal Code Section 707(5) (Proposed Official Draft).

The question of what constitutes an adequate ability to rebut has, however, been vigorously debated. See, e.g., Note: Due Process in Felony Sentencing, 81 Harv.L.Rev. 821 (1968); Lehrig, *supra*.

A number of courts have already ruled that, where substantial issues of fact are disputed, a hearing must be held, e.g., United States v. Battaglia, 478 F.2d 854 (5th Cir., 1972); United States ex rel Brown v. Rundle, 417 F.2d 282 (3d Cir., 1969), *after remand*, 427 F.2d 223 (3d Cir., 1970). Based on the holdings of these cases alone, Aloï was entitled to a hearing on the charges against him as requested by his attorney.¹⁶⁸ Failure to permit adequate rebuttal renders the sentence invalid.

He further argues that a succession of Supreme Court decisions beginning with Kent v. United States, 383 U.S. 541 (1966) and culminating in Gagnon v. Scarpelli, 411 U.S. 778 (1973), compel the conclusion that the previously undefined "right to rebut" must now be read to include "minimum requirements of due process," e.g., Goldberg v. Kelly, 397 U.S. 254 (1970).

¹⁶⁷This is true even where only the possibility of reliance is shown, e.g., United States v. Rollerson, 491 F.2d 1209, 1213 (5th Cir., 1974).

¹⁶⁸There is no question that counsel attempted orally to rebut many of these charges--by showing the constant IRS audit, etc., but that faced with their overwhelmingly amorphous nature, he could not do so effectively without an actual hearing.

These include the right to cross-examine which was specifically denied him in the instant case.

Courts wrestling with the problems of fairness in sentencing have continually found themselves faced with the apparently restrictive language of Williams v. New York, 337 U.S. 241 (1949). That case has often been cited for the proposition that due process does not require an adversary hearing at sentencing. Many courts and commentators have noted that the citation goes far beyond what the facts in that case support. See, e.g., United States v. Picard, 464 F.2d 215, 219 (1st Cir., 1972); United States v. Trigg, 392 F.2d 860, 869 (7th Cir.) cert. denied, 391 U.S. 961 (1968); Lehrig, supra, at p. 247. But in any case, as the demands of due process have been significantly expanded since Williams, its broad "holding" is no longer sufficient ground for denying a defendant certain basic rights at sentencing.

In Kent, supra, and In re Gault, 387 U.S. 1 (1967), the Court first re-examined the meaning of due process in proceedings (like sentencing) traditionally characterized as discretionary. Any ambiguity in Kent was dispelled by Gault's specific holding that cross-examination is required in juvenile proceedings.¹⁶⁹

Next, counsel was held constitutionally required at sentencing, Mempa v. Rhay, supra,¹⁷⁰ and a due process hearing was required at a post-sentencing

¹⁶⁹In Kent the Court had refuted the statement that "counsel's role is limited to presenting to the court anything on behalf of the child which might help the court in arriving at a decision." Id. at p. 563. This is virtually precise description of the role counsel is generally allowed at sentencing.

¹⁷⁰The Court suggested that a particularly strong reason for counsel at the deferred sentencing procedure there employed was that "the eventual imposition of sentence on [a] prior plea of guilty is based on the alleged commission of offenses for which the accused was never tried" Id. at pp. 136-37 (Emphasis added).

procedure where the defendant was subject to possible additional punishment.

Specht v. Patterson, 386 U.S. 605 (1967).

The Court then focussed briefly on sentencing and breathed new life into Townsend v. Burke, supra, by holding that any sentence based upon consideration of a prior record including convictions obtained without a lawyer would be deemed

founded at least in part upon misinformation of constitutional magnitude.

[Tucker v. United States, supra,
404 U.S. at p. 447]

and must, accordingly, be set aside.

Finally, and most recently, the demands of due process have been extended to post-conviction proceedings for revocation of parole, Morrissey v. Brewer, 408 U.S. 471 (1971), and probation, Gagnon v. Scarpelli, supra.

While expressly recognizing that

even though the revocation of parole is not a part of the criminal prosecution, we held [in Morrissey] that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process.

[Gagnon, supra, at p. 781]¹⁷¹

The Court found that, like a trial, revocation of either probation or parole has "two analytically distinct components." These are, first, whether the parolee has in fact acted in violation of one or more conditions of his parole¹⁷²

¹⁷¹Sentencing is, of course, part of the criminal prosecution, Mempa, supra, and thus presumptively entitled to at least as much, if not more, due process than is required in other instances. See Justice Burger's opinion in Morrissey, supra, at p. 480.

¹⁷²This is directly analogous to the guilt determining stage of a criminal trial except that parole violation may be based on somewhat less precise criteria than criminal liability.

and, second, whether the parolee should be committed to prison or should other steps be taken.¹⁷³ Id. at pp. 479-80.

Justice Powell then found that in requiring two hearings to determine these two separate questions, the latter must be "less summary--because the decision under consideration is the ultimate [one]." This latter hearing accordingly must include the following "minimum requirements of due process":

(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking [probation or] parole.

[Morrissey v. Brewer, supra, at p. 489]¹⁷⁴

There is no way to square the holdings of this line of cases and Townsend v. Burke with denial of the right, at sentencing, to rebut allegedly inaccurate or incorrect information by cross-examination.

The appellant was, accordingly, denied the due process of law at his sentencing; that sentence must be set aside.

¹⁷³ Similarly, this is the question confronted by the sentencing judge in most situations except where a mandatory sentence is required.

¹⁷⁴ Judge Feinberg has noted that although these cases involve hearings before administrative agencies or boards, there is no reason why fewer safeguards should be required before a judge. United States v. Baker, 487 F.2d 360 (2d Cir., 1973) (Feinberg, J., dissenting on other grounds).

POINT IX

INCORPORATION BY REFERENCE

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Appellant incorporates all statements of fact and issues of law relevant to him and contained in the briefs of all his co-defendants.

CONCLUSION

For all of the above reasons, Aloï's convictions on all three counts should be reversed.

New York, New York
May 16, 1974

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